IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Hemp Industries Association, et al.	)	
	)	
Petitioners	)	
	)	
v.	)	No. 01-71662
	)	
Drug Enforcement Administration, et al.	)	
	)	
Respondents	)	
	)	

MEMORANDUM IN SUPPORT OF RESPONDENTS' OPPOSITION TO PETITIONERS' EMERGENCY MOTION FOR A STAY

I. INTRODUCTION

The following statement was issued by a member of the Hemp Industries Association (one of the *petitioners*) on January 28, 2002:

> It is the position of HempNut, Inc. and the Hemp Food Association (HFA) that [the Drug Enforcement Administration's October 9, 2001] Rule is merely a clarification and confirmation of the basis under which DEA, U.S. Customs, and all responsible hempseed importers have already been operating under for quite some time, namely, that hempseed products may not contain tetrahydrocannabinol (THC).
>
> A survey of hempseed importers revealed that all were in full compliance with the Rule, and have no THC in their products.
>
> At HempNut we are amused that some have seemed to have been caught by surprise by the fact that foods cannot contain THC! We have worked for years on making sure that there is no THC in our products, for few simple reasons: 1) it is good customer service to make sure our foods are drug test safe to protect their careers, jobs, military status, or freedom; 2) THC is an unapproved food additive; and 3) hempseed foods are about omega-3, not THC. Independent lab tests confirm our foods have no THC.

The above statement (Exhibit 1), which was issued by a member of the Hemp Industries Association (Exhibit 2), along with a similar statement by the Hemp Food

Association (Exhibit 3)[1] indicate that some members of the petitioner organization find DEA's "hemp" rules reasonable and do *not* seek intervention by this Court.

Even ignoring that some of the petitioner members seem to side with DEA in this case, it is difficult to imagine that anyone could read DEA's interpretive rule (66 Fed. Reg. 51,530) and conclude that it is anything other than what it purports to be: an *interpretive* rule. Nor is there any way to view this document objectively and conclude that DEA violated the Administrative Procedure Act (APA) by issuing it. (See Brief for the Appellees/Respondents.) Yet, if one were to suspend adherence to basic APA principles, then unquestioningly accept the factual allegations contained in petitioners' latest motion (which are of a variety that this Court has previously declared to be immaterial to the question of whether a rule is legislative or interpretive), one might erroneously conclude that they have made a showing of "harm" entitling them to a stay of the interpretive rule.

What petitioners here classify as harm justifying their proposed stay can be summarized as: (I) the examination, and eventual allowance, by the United States Customs Service (Customs) of a proposed importation of a shipment from Canada of containers marked "hempseed"; (ii) telephone calls made by "hemp" food retailers to DEA prompting DEA to repeat what was already published in the Federal Register; and (iii) the decision by some retail distributors (not DEA) to remove from their store shelves certain "hemp" food products because some of the petitioners would not assure the distributors that the products contain no THC. As explained below, the foregoing facts do not constitute "harm," cannot be attributed to any unlawful or improper conduct by DEA or other federal officials, and cannot serve as the basis for petitioners' proposed stay.

II. BACKGROUND

The nature of the appeal underlying this latest motion is fully addressed in the Brief for Appellees/Respondents, which was submitted to this Court on February 6, 2002. As that brief makes clear, the appeal turns entirely on whether DEA's interpretive rule is, in fact, an interpretive rule – not as, petitioners contend, a legislative rule. Immediately

[1] The last paragraph on page 7 of Exhibit 3 states that "the Director of the Hemp Food Association is also the founder of HempNut, Inc."

after the Government submitted its February 6 brief on the merits, petitioners filed an "Emergency Motion for Stay Pending Review Under Circuit Rule 27-3" ("Petitioners' Emergency Motion").

Petitioners' Emergency Motion incorporates, by reference, the legal arguments they submitted in their October 19, 2001 Urgent Motion for Stay Pending Review. What distinguishes this current motion from their prior motion are their latest factual allegations, through which they attempt to create the impression that DEA is on the verge of some "new" enforcement action that must be stopped. Aside from the fundamental fact that there is no basis for their underlying appeal (and therefore no basis for this Court to grant any sort of relief), there simply has been no change in DEA's policy since the rules were published on October 9, 2001. Nor has DEA taken any enforcement action since October 9 to implement its interpretation of the law set forth in the interpretive rule – much less any type of action that would warrant the unheard-of remedy of a stay of an interpretive rule.

III. MISREPRESENTATION IN PETITIONERS' MOTION

Petitioners' latest motion, taken at face value, might lead on to conclude mistakenly that there is a factual and legal basis for issuing some sort of "stay." However, petitioners' motion contains several misrepresentations. Upon clarification of these misrepresentations, it is evident that petitioners' arguments are meritless and do not provide the basis for the issuance of a stay.

1. The Meaning and Significance of the Grace Period

As set forth in the interim rule (66 Fed. Reg. 51,539), DEA provided a 120-day grace period for persons to dispose of existing inventories of THC-containing products not exempted from control. That 120-day grace period originally was to end on February 6, 2002. However, as this Court was made aware by letter of February 7, 2002 from undersigned counsel, DEA extended the grace period an additional 40 days until March 18, 2002.[2]

Petitioners' portrayal of the grace period creates two false impressions: (I) that DEA has encouraged distributors to continue distributing THC-containing food products

during the grace period; and (ii) that, once the grace period ends, DEA will swoop down upon distributors in a wave of enforcement action. In fact, DEA stated expressly in both the interim rule (66 Fed. Reg. at 51,543) and the February 7, 2002 letter to this Court (a copy of which was provided to opposing counsel) that, during the grace period, although DEA will take no action against persons who are merely in possession of preexisting inventories of THC-containing food and beverage products, "no person may use any THC-containing 'hemp' product for human consumption (as defined in the interim rule); nor may any person manufacture or distribute such a product with the intent that it be used for human consumption within the United States."

Petitioners distort telephone calls made in recent weeks by "hemp" food retailers to DEA in an attempt to create the illusion that DEA is on the verge of an enforcement crackdown. When such calls came in to the agency, DEA only repeated what was already published in the October 9, 2001 Federal Register: (i) that any food or beverage product that contains THC is considered a schedule I controlled substance under DEA's interpretation of the CSA; and (ii) that any person with preexisting inventories of such nonexempted THC-containing products has a grace period (previously set to expire on February 6) to dispose of such products. See Declaration of Scott Collier, Exhibit 5. Since DEA published the rules on October 9, the agency has not taken any enforcement action to seize any "hemp" products in the United States; nor has the agency threatened to do so.

2. **The Issuance of the Interpretive Rule Did Not Affect the Manner in Which Customs Processed the Shipment Referenced by Petitioners**

Petitioners erroneously suggest that Customs has implemented a new policy toward "hemp" products as a result of DEA's issuance of the interpretive rule. They also claim that "harm" has been done to them because Customs detained, inspected and *released* a shipment of "hempseeds" from Canada.

That petitioners would make such claims suggests that they are unaware of the laws of the United States governing the importation of products into this country or the routine practices of Customs. Petitioners apparently believe that they are entitled to legal

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[2] DEA has now published a notice of the extension of the grace period on its web site (www.usdoj.gov/dea) and has asked the Federal Register to do likewise on an expedited basis. The Federal

redress if Customs does anything other than immediately wave through the border all shipments with the word "hemp" on the containers.

The propriety of Customs' handling of the shipment of "hempseeds" is not an issue over which this Court has jurisdiction.[3] Nonetheless, petitioners' allegations necessitate reference to some fundamental legal concepts. Customs has unquestionable authority and responsibility, pursuant to the Tariff Act of 1930, to examine merchandise presented at the border. Specifically, in accordance with 19 U.S.C. 1499(a), merchandise presented for inspection at the border may be inspected, examined, or appraised by Customs and not delivered from Customs' custody until it is reported by Customs to have been "truly and correctly invoiced and found to comply with the requirements of the laws of the United States." Customs has five days, excluding weekends and holidays, "following the date on which merchandise is presented for entry at the border" to decide whether to release or detain merchandise. 19 U.S.C. 1499(c)(1).[4]

The foregoing statutory authority provided Customs the clear basis for detaining and inspecting the shipment of "hempseeds" about which petitioners complain (Petitioners' Emergency Motion at 5). Moreover, the shipment of "hempseeds" about which they now complain was examined in accordance with the Customs policy that has been in effect since prior to the publication by DEA of the "hemp" rules on October 9, 2001. See Declaration of Karen Bates, Exhibit 6, ¶ 7. Ms. Bates also declared that she was "not aware of any Customs-wide change in practice, instructions, policies, directives, or other issuance, written or otherwise, connected to the DEA hemp rules published on October 9, 2001." *Id.* Tow of the "hemp" food entities who are affiliated with the petitioners have stated that the requirement "hemp" food products contain no THC is a "basis under which DEA, US Customs, and all responsible hempseed importers have already been operating under for quite some time." See Exhibits 1, 2, and 4.

What makes petitioners' complaint about Customs' inspection of this shipment of "hempseeds" even more unwarranted is that petitioners themselves admit that this very

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Register has advised DEA that the notice should appear in their February 15, 2002 edition.

[3] The Court of International Trade has exclusive jurisdiction of any civil action commenced to contest the denial of a protest of any exclusion of merchandise. See 19 U.S.C. 1515; 28 U.S.C. 1581(a).

shipment was permitted entry in the United States. Petitioners appear to suggest that this Court should draw an adverse inference against the Government in this litigation because Customs lawfully detained and inspected a shipment marked "hempseeds" prior to releasing it into the United States. Such a suggestion is completely contrary to the broad authority and responsibility vested in Customs to examine merchandise at the border.

3. DEA Has Not Required Anyone to Utilize a Particular Method of Testing for the Presence of THC in Food and Beverage Products

In their emergency motion and attached declarations, petitioners suggest that DEA has established a new rule requiring them to utilize a certain type of testing to show that their "hemp" food and beverage products contain no THC. DEA has done no such thing. Such a requirement appears nowhere in the three rules DEA published on October 9. Nor has DEA insisted on any type of testing in responding to telephone inquiries by petitioners. See Declaration of Scott Collier, Exhibit 5, ¶ 6.

Petitioners incorrectly assert in their motion (page 3) that, "with the February 6, 2002 deadline imminent," DEA embarked on a campaign of "advising distributors" to discontinue sales of their "hemp" products unless they could "represent without qualification that their products contain no THC whatsoever." In truth, all DEA did was to respond to telephone calls it received from certain distributors and retailers. Moreover, in responding to such calls, DEA simply repeated what it said in the October 9 Federal Register: that "hemp" food and beverage products are only exempt from control if they contain no THC. See Decl. Of Scott Collier, Exhibit 5, ¶¶ 3 and 6. The reasonableness of DEA's approach has been articulated by some of the petitioner members themselves, in the following recent statements:

> Even the DEA agrees that hempseed foods with no THC are legal, and that people are creating hysteria where it is least needed, doing us all a disservice…
>
> DEA has made it very clear that this is only a ban on THC in hempseed foods, **not a ban on hempseed foods**.
> …

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[4] As set forth in section 1499(c)(1), the time restrictions contained therein do not apply "in the case of merchandise with respect to which the determination of admissibility is vested in an agency other than the Customs Service."

> The hempseed products industry absolutely **has the technology** to provide "zero THC" hempseed and hempseed-based products….
>
> **Unreasonable fear about THC** is holding back the hempseed industry's very ability to be sustainable and viable…
>
> In the [rules published in the Federal Register], DEA has gone **out of their way** to clarify the issue, which is the same position as [the Hemp Foods Association, a member of the Hemp Industries Association] regarding products containing no THC….

Exhibit 1[5] (bold in original); see also Exhibit 3 (same).

Thus, DEA has neither mandated that private entities utilize certain methods of testing for THC nor has DEA made it impossible for private entities to determine (to their own satisfaction) that their "hemp" food products contain no THC.

IV. PETITIONERS HAVE FAILED TO DEMONSTRATE THE REQUIREMENTS FOR THEIR REQUESTED STAY

As petitioners do in their latest motion, the Government incorporates, by reference, its previously-submitted memorandum discussing the law governing the issuance of a stay in this type of case. See Respondents' November 8, 2001 Opposition to Petitioners' Urgent Motion for a Stay. Summarized below are the key points.

1. Petitioners Have No Likelihood of Success on the Merits

As explained in the February 6, 2002 Brief for the Appellees/Respondents, in order for petitioners to prevail, they must convince this Court that DEA's interpretive rule is, in every sense of the term, "interpretive." It provides the agency's interpretation of the plain language 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. Indeed, DEA's interpretive rule is consistent with what the Supreme Court would consider "a prototypical example of an interpretive rule": that "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guersey Memorial Hosp*., 514 U.S. 87, 99 (1995).

Under the clear precedent of this Court, petitioners' claims about how their business has been affected by the rule are irrelevant to the ultimate question of whether

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[5] The web page reproduced in Exhibit 1 has been updated in recent days. However, the above quotes remain substantially the same. The latest web page is reproduced in Exhibit 4.

the rule is interpretive or legislative. "[T]his Court has made clear that 'impact' is not a basis for finding a rule not to be interpretive." *Chief Probation Officers of California v. Shalala*, 118 F.3d 1327, 1335 (9th Cir. 1997). Rather, the deciding factor is whether the rule is binding on the courts. Where, as here, the rule "does not purport to have the force of law or to warrant the deference accorded to a regulation that is challenged in the courts," it cannot be deemed legislative. *Id.*

2. Petitioners Have Failed to Establish Irreparable Injury, That the Balance of Hardships Tips in Their Favor, or That the Public Interest Favors a Stay

Petitioners point out that some retail distributors have removed "hemp" food products from their store shelves because they (not DEA) were not sufficiently satisfied that the products contained no THC. The fact that private entities have taken action in response to DEA's interpretive rule cannot serve as the basis for a stay, and petitioners cite no authority for such a proposition. As quoted above, this Court has held that "'impact' is not a basis for finding a rule not to be interpretive."

Further, as explained in Respondents' November 8, 2001 Opposition to Petitioners' Urgent Motion for a Stay, even if it is assumed that petitioners will suffer some economic loss if they choose to abandon certain products in light of the interpretive rule, petitioners have not shown such loss to be irreparable. See State of Ohio v. Nuclear Regulatory Commission, 812 F.2d 288, 291 (6th Cir. 1987). (economic loss does not constitute "irreparable injury," in and of itself, for purposes of determining whether a stay is required; in addition, "the harm alleged must be both certain and great, rather than speculative or theoretical").

Moreover, there are those in the "hemp" food industry (and affiliated with petitioners) who have stated emphatically that DEA's publication of the "hemp" rules on October 9 was reasonable, consistent with longstanding practice, and no cause for alarm among those in the industry. See Exhibits 1,3, and 4.

V. THE REMEDY SOUGHT BY PETITIONERS HERE – A STAY OF AN INTERPRETIVE RULE – IS UNPRECEDENTED AND WOULD BE UNCONSTITUTIONAL

There is abundant case law addressing whether certain agency rules are interpretive or legislative, with the ultimate question in such cases being whether the rules were improperly issued, in violation of the APA, without notice and comment. Despite the wealth of cases in this area, *there appears to have never been a case in which a court has ordered an agency to refrain from interpreting the law in a certain manner*. The reason for this becomes evident when one considers the respective roles of the Judicial and Executive Branches.

Absent a constitutional infirmity in the law or how it is administered (none is alleged here), a court may not order an agency to refrain from enforcing the law it is charged with administering. To do so would interfere with the Executive Branch's obligation (under art. II, § 3) to "take Care that the Laws be faithfully executed." A subset of this principle is that a court may not order an agency to refrain from interpreting the law it administers, since part of an agency's statutory duty (and that recognized by the APA) is the issuance of interpretive rules. It is probably because these concepts are so plainly evident in the Constitution that there apparently has never been an occasion for a Court to so state.

There have been cases where courts have struck down specific *past action* taken by agencies because a rule issued without notice and comment was enforced as a legislative rule. But never has there been a case where a court has directed that, in future, hypothetical cases, an agency was to be barred from interpreting the law in a certain manner (again, assuming no constitutional infirmities).

Yet, it is precisely this type of unconstitutional order (that which would violate the Take Care clause) which petitioners ask this Court to issue. To be precise, petitioners want this Court to issue and order along the following lines:

> The Drug Enforcement Administration (DEA), and all other federal agencies and officials who enforce the Controlled Substances Act (CSA), are hereby ordered not to enforce the interpretation of the CSA published by DEA in the October 9, 2001 Federal Register in any cases which may arise in the future.

The unconstitutionality of such an order is further evident from another perspective. The practical effect of such an order would be to direct DEA (and other federal agencies who enforce the CSA) to refrain from enforcing the plain text of the

CSA: that "any material, compound, mixture, or preparation, which contains any quantity of … [THC]" is a schedule I controlled substance. 21 U.S.C. 812(c), schedule I(c)(17).

In essence, such an order would direct DEA to reject its own interpretation of the statute it administers in favor of petitioners' preferred reading of the statute (that the phrase "any material, compound, mixture, or preparation, which contains any quantity of … [THC]" does not apply to those portions of the cannabis plant excluded from the CSA definition of marijuana). To so order the agency to apply a certain interpretation of the law in future, hypothetical cases would constitute an unconstitutional advisory opinion.

A reviewing court *may* order an agency to engage in notice and comment rule making prior to the issuance of a *legislative* rule. That is, a court may direct that, prior to treating a rule as *binding on the courts*, an agency must engage in notice and comment rule making. But DEA has made no such effort here to treat its interpretive rule as binding on the courts. To the contrary, DEA has given the rule all the earmarks of an interpretive rule. Indeed, DEA underscored the interpretive nature of the rule by issuing it simultaneously with a proposed rule, which, in plain contrast to the interpretive rule, was offered for public comment and will, when finalized, have the force and effect of a legislative rule.

Petitioners would have this Court turn the APA on its head by using it as weapon to paralyze agencies from issuing any interpretations of the law they administer. Petitioners would have this Court establish precedent that would allow any person or entity who disagrees with an agency's interpretive rule to quash the rule by labeling it a "legislative" rule. Then (following the next step in petitioners' recipe for defeating interpretive rules), the regulated entity should file for a stay of the interpretive rule, so it can attach declarations (purportedly to demonstrate "harm") that will show how the interpretive rule has detrimental impact on the regulated entity. In this manner, the regulated entity can turn the focus of the case into a trial over the "hardship" that the agency's interpretation would supposedly cause – thereby circumventing this Court's holding that the impact of a rule is immaterial to the question of whether the rule is interpretive or legislative.

VI. CONCLUSION

Petitioners have failed to make the required showing for a stay pending review. For the reasons stated above, respondents respectfully request that the emergency motion for stay pending review be denied.

Respectfully submitted,

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