UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-71662

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

EMERGENCY MOTION FOR STAY PENDING REVIEW
UNDER CIRCUIT RULE 27-3

Petitioners are companies that manufacture, distribute and/or sell, in the United States, processed hemp seed or oil, or food and beverage products containing processed hemp seed or oil, which seed, oil or products may contain non-psychoactive miniscule trace amounts of residual resin containing naturally occurring tetrahydrocannibinols ("THC"). Petitioners have been lawfully importing and distributing seed and oil, and/or manufacturing and selling food and beverage products made from such seed and oil, for many years.

On October 9, 2001, with no opportunity for notice and comment, respondent Drug Enforcement Administration ("DEA") published an "Interpretive Rule" purporting to "interpret" the Controlled Substances Act,

21 U.S.C. §§8702 et seq. ("CSA"), and DEA's own regulations to treat as a Schedule I controlled substance any hemp seed or oil, or seed or oil product, "that contains any amount of THC…." 66 Fed. Reg. 51530, 51533 (Oct. 9, 2001). This "Interpretive Rule", made effective immediately upon publication, had the effect of instantly transforming Petitioners' long-standing business activities into a criminal offense.

On October 19, 2001, Petitioners filed a Petition for Review with this Court, pursuant to 21 U.S.C. §877 and Rule 15(a), Federal Rules of Appellate Procedure. Simultaneously, Petitioners filed an Urgent Motion for Stay Pending Review, pursuant to Rules 18 and 27, Federal Rules of Appellate Procedure, and Circuit Rule 27-3(b), seeking a stay of DEA's "Interpretive Rule" pending review.

The grounds for issuing a stay pending review are set forth fully in the Urgent Motion for Stay. In summary, Petitioners are likely to prevail on the merits because it is clear that DEA's so-called "Interpretive Rule" is a final substantive legislative rule—rendering criminal one day conduct that was lawful the day before—issued without notice or opportunity to comment as required by the Administrative Procedure Act, 5 U.S.C. §553, let alone formal rulemaking on the record as after opportunity for hearing as required by the CSA, 21 U.S.C. §811(a). Second, Petitioners will be irreparably

harmed unless a stay is granted, as demonstrated in the Urgent Motion and herein. Finally, the balance of hardships favors Petitioners: Petitioners will be forced to shut down substantial parts, or in some cases all, of their business operations, while DEA has never claimed that any delay in implementing its new "Interpretive Rule" would pose any threat to public health or safety.

On November 8, 2001, Respondents filed an Opposition to the Urgent Motion to Stay. On November 15, 2001, Respondents filed a Reply to the Opposition of DEA to the Urgent Motion.

In an "Interim Rule" published simultaneously with the "Interpretive Rule", 66 Fed. Reg. 51539 (Oct. 9, 2001), DEA provided that:

> It seems likely that, upon publication of this rule, some manufacturers and distributors of THC-containing "hemp" product will have in their possession existing inventories of such products that will be considered controlled under the interpretive rule and the proposed rule and not exempted from control under this interim rule. In fairness to such persons, the following grace period is being provided. Any person who, on the date of publication of this interim rule, possesses a THC-containing "hemp" product not exempted form control under this interim rule will have 120 days (until February 6, 2002) to dispose of such product.

66 Fed. Reg. at 51543.

With the February 6, 2002 deadline now having passed, DEA has begun to enforce its "Interpretive Rule." At least three of the Petitioners

have received a communication from Whole Foods Market, the largest retailer of natural foods in the United States, indicating that Whole Foods would pull Petitioners' products from their grocery shelves on Wednesday, February 6, unless the Petitioner companies provided a statement representing unequivocally and without qualification that their products contain no THC. See Declaration of John W. Roulac ("Roulac Dec."), attached hereto as Exhibit 1; and Declaration of Arran Stephens ("Stephens Dec."), attached hereto as Exhibit 2.[1] Since the Petitioner companies cannot know for certain whether their products contain THC at levels less than those detected by normal laboratory analysis, it is impossible for the companies to provide such statements. Accordingly, the sales of these companies to Whole Foods will be shut down. See Roulac Dec. at ¶ __; Stephens Dec. at ¶ __. Manifestly, to the extent other distributors and retailers follow suit, the entire business of Petitioner companies in the U.S. will be shut down as long as DEA's "Interpretive Rule" remains in effect.

In addition, on Saturday, February 2, 2002, the U.S. Customs Service began to impose an apparently new, and unwritten, policy requiring hemp food products to be entered into the U.S. during weekday business hours, for

[1] The communication from Whole Foods was addressed to Petitioners Nutiva, Nature's Path and Hempola. Declarations from the heads of two of those companies are attached: John Roulac of Nutiva and Arran Stephens of Nature's Path.

testing. A shipment of Petitioner Nutiva's products was denied entry into the United States, on that date, by the Customs Service, at the Port Huron, Michigan port of entry. See Roulac Dec. at ¶ __. Customs Service agents indicated to Nutiva's Customs broker that, as a result of such new unwritten guidance from the Customs Service district office, Nutiva's products would have to be held for testing. Although this Nutiva shipment was ultimately released, the Customs Service insisted on testing a sample of the shipment and it is unclear whether or under what circumstances further shipments will be denied entry into the U.S. Id. at ¶ __.

For these reasons, we respectfully submit Petitioner's Urgent Motion should now be treated as an Emergency Motion. Unless DEA's unlawful "Interpretive Rule" is stayed immediately, this Court's review of that Rule may become moot as DEA moves to shut down Petitioners' industry now that the February 6 deadline has passed.

CONCLUSION

For the foregoing reasons, Petitioners' Emergency Motion for a Stay Pending Review should be granted.

Respectfully submitted,

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Dated: February 6, 2002 Attorneys for Petitioners