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

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

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 published an Interpretive 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 effect on property rights establishes that the Rule is not simply "interpretive," and 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. 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

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court has been asked to decide whether the DEA's Interpretive Rule is actually a legislative rule promulgated in violation of the APA's rulemaking procedures. By definition, interpretive rules "'simply clarify or explain existing law or regulations.' . . . *They do not conclusively affect the rights of private parties*." *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir. 1994) (emphasis added). Legislative or substantive rules, on the other hand, "create rights, impose obligations, or effect a change in existing law." *Id.*

Petitioners have advanced several reasons why, as a statutory and regulatory matter, the DEA's Rule is not an "interpretive" rule. Constitutional reasons require the same conclusion. The Fifth Amendment prohibits the government from taking

private property, whether real or personal, for public use without just compensation. The Supreme Court has recognized two types of government action that constitute takings *per se*: (1) the permanent physical confiscation of private property, *see Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 426 (1982) (invasion of real property); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-64 (1980) (confiscation of personal property); and (2) the imposition of regulatory restrictions which deny "all economically beneficial or productive use" of private property, *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The DEA's Interpretive Rule, which not only criminalizes Petitioners' business activities involving edible hemp products but also will result in the confiscation and destruction of these products, constitutes a *per se* taking under either category. The Rule thus conclusively and irrevocably unsettles Petitioners' longstanding property rights. This fact, standing alone, establishes that the Rule cannot be, as the DEA claims, an "interpretive" rule.

Not only does the DEA's Interpretive Rule *implicate* the Takings Clause, which alone renders it a "legislative" or substantive rule, but it affirmatively *violates* the Fifth Amendment. Indeed, the government is never authorized to take

private property "without a justifying public purpose, even though compensation be paid." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (quoting *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937)); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978); *McDougal v. County of Imperial*, 942 F.2d 668, 679-80 (9th Cir. 1991). The evidence cited by Petitioners conclusively establishes that the DEA's new rule does not reasonably further any conceivable public purpose. Accordingly, the Rule is invalid and cannot be allowed to stand.

ARGUMENT

I. THE DEA'S INTERPRETIVE RULE EFFECTS A *PER SE* TAKING BOTH BECAUSE IT AUTHORIZES THE PERMANENT PHYSICAL SEIZURE OF PETITIONERS' PROPERTY, AND BECAUSE IT DENIES ALL BENEFICIAL USE OF THAT PROPERTY.

A. The Rule Effects A *Per Se* Physical 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*, 458 U.S. at 3175-76. 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*, 505 U.S. at 1015.

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. In *Andrus v. Allard*, for example, the Supreme Court held that a federal prohibition of the sale of eagle feathers was not a taking as applied to traders of bird artifacts. 444 U.S. 51, 53-54 (1979). The Court observed that the challenged regulations did "not compel the surrender of the artifacts" and that there had been "no physical invasion or restraint upon them." *Id.* at 65. Indeed, the Court concluded, "it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds." *Id.* at 66. *Cf. 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.

"Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" *Id.* (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)). In the challenged Rule, the DEA has interpreted the CSA and DEA regulations "to declare any [edible] product that contains any

amount of tetrahydrocannabinols (THC) to be a schedule I controlled substance." *Interpretation of Listing of "Tetrahydrocannabinols" in Schedule I*, 66 Fed. Reg. 51,530 (Oct. 9, 2001). 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 other associated property.[1/] 21 U.S.C. § 881(a). Indeed, in the wake of the regulation, all of this property is now subject to government forfeiture. *Id.*

Additionally, as a result of the DEA's interpretation, 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

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[1/]The Supreme Court has held that government seizure or occupation of property constitutes a taking no matter how small the amount taken. *Loretto*, 458 U.S. at 430. Thus, regardless of the *size* of Petitioners' existing stores of edible hemp products, the DEA's confiscatory regulation nevertheless triggers the Fifth Amendment.

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.[2/]

B. The Rule Effects A *Per Se* Regulatory Taking

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 limited takings 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

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[2/]The fact that the DEA has authorized a 120-day grace period to allow for the "voluntary disposal" of existing inventories of THC-containing edible hemp products does not in any way alter this conclusion. *Exemption From Control of Certain Industrial Products and Materials Derived From the Cannabis Plant*, 66 Fed. Reg. 51,539, 51,543 (Oct. 9, 2001) ("Interim Rule"). Indeed, the language of the Interim Rule expressly states that during this grace period, "no person may *use* any THC-containing 'hemp' product for human consumption . . . nor may any person *manufacture* or *distribute* such a product with the intent that it be used for human consumption within the United States." *Id.* (emphasis added). Thus, as explained in Part I(B) below, to the extent that Petitioners are authorized to retain *possession* of their products for a spell, that right is completely hollow because the only permitted *use* of the products is to throw them away.

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."[3/] 505 U.S. at 1015, 1019. *But cf. Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (prohibition 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

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[3/]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*, ___ U.S. ___, 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.

never permitted regulations, like this one, that leave *absolutely no* viable use of Petitioners' property, economic or otherwise. Indeed, as explained in Part I (A) above, the DEA's Interpretive 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.[4/] *Id.* at 1015; *see also id.* at 1068 (Stevens, J.,

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[4/]Where the government seeks to sustain regulation that deprives property of all beneficial use, it may resist compensation "only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027. In other words, the Supreme Court has recognized that if an owner could not have reasonably expected to use his property in a given way when he acquired title, the government's subsequent prohibition of that use will not constitute a taking. *Id.* at 1029-30. Here, as Petitioners adeptly explain in their opening brief, the minuscule amounts of naturally-occurring THC found in hemp seed and oil have never before been controlled by the CSA schedules and, indeed, are specifically excluded in the CSA's definition of marijuana. Petitioners' Brief ("Pet'rs Br.") at 16-29. This position has been confirmed more than once by Justice Department officials, Pet'rs Br. at 29-32, and has been adopted by at least one circuit court, *see United States v. McMahon*, 861 F.2d 8 (1st Cir. 1988). Against this backdrop, Petitioners' decision to invest substantial amounts of time and money researching, developing and marketing edible hemp products was eminently reasonable.

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).

II. THE DEA'S INTERPRETIVE RULE EFFECTS AN IRREMEDIABLE, UNCONSTITUTIONAL TAKING BECAUSE IT DOES NOT FURTHER ANY CONCEIVABLE 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 Interpretive Rule strips Petitioners of all of their rights in the regulated property. Because the rule does so without furthering any conceivable public interest, it must be invalidated.[5/] *Midkiff*, 467 U.S. at 241.

Congress passed the CSA because the "illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a

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[5/] Although the Court must strike the DEA's "Interpretive Rule," Petitioners will also have a claim for compensation for any damages incurred between the October 9, 2001 effective date and the date on which the Rule is ultimately invalidated. Indeed, "where the [regulation has] already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

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, at the time Congress drafted this definition, it was well aware that sterilized hemp seed and oil contain trace amounts of THC. Pet'rs Br. at 17-24. Nevertheless, because the overwhelming weight of 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," Pet'rs Br. at 19 (quotation and citation omitted), Congress made the decision to exclude those materials from the definition of marijuana.

The interpretation now urged by the DEA — 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 — inevitably results in government regulation of materials that have absolutely no deleterious impact on human health. Indeed, recent scientific studies indicate that the consumption (even in amounts vastly exceeding normal use) of edible hemp seed and oil, as well as products derived from these ingredients, does not have any harmful psychoactive effect. *See* Petitioners' *Comments on Proposed Rule, Clarification of Listing of "Tetrahydrocannabinols" in Schedule I* at 24-26 (Dec. 10, 2001) (attached as Exhibit A) ("Comments"). 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. Pet'rs Br. at 7. The DEA failed to put forth *any* evidence in support of its Rule that would contradict these findings. 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 compiled by Petitioners suggests, foodstuffs made from sterilized hemp seed and oil are simply "not capable of causing confirmed positive test results in workplace drug tests if federal guidelines for testing procedures are followed."[6/] Exhibit A, Comments at 27. Once again, the DEA has neither argued nor submitted any evidence that would prove otherwise. In sum, therefore, because the substantial property restrictions imposed by the DEA's Interpretive Rule do not reasonably further any conceivable public purpose, the Rule must be invalidated.

[6/]Even if Petitioners' products did 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. As Petitioners point out, poppy seeds contain trace elements of controlled substances. Pet'rs Br. at 28-29. Nevertheless, edible products containing these seeds are not regulated under the CSA, and federal authorities have adjusted the drug testing thresholds "to reduce the probability that poppy seed ingestion would trigger false positives." Exhibit A, Comments at 28. Thus, just as the government has done in the poppy seed industry, it is clear that the risk of drug testing interference can be eliminated without substantially infringing upon the property rights of hemp food producers.

CONCLUSION

For the foregoing reasons, the DEA's challenged rule is not an "interpretive" rule, exempt from the APA's rulemaking procedures, but rather a "legislative" rule that conclusively and irrevocably unsettles Petitioners' property rights. Because the rule, if permitted to stand, will violate the Takings Clause of the Fifth Amendment, it should be invalidated.

Respectfully submitted,

_____

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Dated: January 14, 2002

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

I certify that:

Q 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,

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

Q Is **not** subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)(5).

Dated: January 14, 2002

_____
Erin Albritton

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 2002, 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:

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Exhibit A

Comments on Proposed Rule