

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 30 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

HEMP INDUSTRIES ASSOCIATION,
et al.,

No. 17-70162

Petitioners,

v.

MEMORANDUM*

U.S. DRUG ENFORCEMENT
ADMINISTRATION and ROBERT W.
PATTERSON, as Acting Administrator,
Drug Enforcement Administration,

Respondents.

On Petition for Review of a Final Rule of the
Drug Enforcement Administration

Argued and Submitted February 15, 2018
San Francisco, California

Before: HAWKINS and TALLMAN, Circuit Judges, and MURPHY,** District
Judge.

Petitioners Hemp Industries Association, Centuria Natural Foods, Inc., and
R.M.H. Holdings, Inc. (collectively “Petitioners”) petition this Court to review a

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Stephen J. Murphy III, United States District Judge for
the Eastern District of Michigan, sitting by designation.

final Drug Enforcement Agency (“DEA”) rule that establishes a new drug code for marijuana¹ extract. We have jurisdiction under 21 U.S.C. § 877, and deny the petition.

The Controlled Substances Act regulates the possession and sale of certain substances, including marijuana. 21 U.S.C. § 812(c), Schedule I (c)(10). On July 5, 2011, the DEA issued a notice of proposed rulemaking (NPRM) that would establish a new drug code specifically for marijuana extract. The DEA reasoned that the new code would assist the U.S. in complying with certain drug-control treaties. Notice and comment followed, but none of the Petitioners participated in it. When the Final Rule was published on December 14, 2016, the DEA addressed the comments raised and noted how it has slightly changed the definition in light of the comments. 81 Fed. Reg. 90,194-01. The rule went into effect on January 13, 2017, and Petitioners timely filed the instant petition for review that same day

A party may petition a Court of Appeal for review of a final DEA decision, 21 U.S.C. § 877, but if the party fails “to make an argument before the administrative agency in comments on a proposed rule,” they are barred “from raising that argument on judicial review.” *Universal Health Servs., Inc. v.*

¹ The Controlled Substances Act uses the spelling “marihuana.” Consistent with our prior practice, we employ the modern spelling here. *Cf. Hemp Indus. Ass’n. v. DEA*, 357 F.3d 1012, 1013 n.1 (9th Cir. 2004).

Thompson, 363 F.3d 1013, 1019 (9th Cir. 2004) (citing *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1249 (9th Cir. 2000)).

Petitioners did not participate in notice and comment, but insist that a comment submitted by a private citizen adequately raised the concerns that now comprise their petition. *See Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024–25. (9th Cir. 2007). The comment focused on the original phrasing of the Proposed Rule, which defined extracts as containing “cannabinols and cannabidiols.” The commenter inquired whether this would cover “100% pure Cannabidiol by itself with nothing else?” The Final Rule put this question to rest when it rephrased the definition to apply to an “extract containing one or more cannabinoids[.]” 81 Fed. Reg. 90195 (Dec. 14, 2016).

Neither this comment nor any other raised with sufficient clarity Petitioners’ current argument that the Final Rule scheduled a new substance. *See Glacier Fish Co. LLC v. Pritzker*, 832 F.3d 1113, 1120 n.6 (9th Cir. 2016). Nor did any comment raise Petitioners’ additional arguments that the Final Rule and its promulgation violated the Information Quality Act, Regulatory Flexibility Act, or Congressional Review Act. Petitioners have therefore waived their arguments relating to the scheduling of a new substance and those Acts. There are no exceptional circumstances to excuse the waiver. *See Exxon Mobil*, 217 F.3d at 1249.

Petitioners also claim the Final Rule conflicts with a portion of the Agricultural Act of 2014 (now codified at 7 U.S.C. § 5940) and the Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 763, 129 Stat. 2242, 2285 (2015). Because the notice-and-comment period predated the Act, Petitioners' arguments relating to those Acts are not waived, but fail nonetheless on the merits.

The Agricultural Act provides that “[n]otwithstanding the Controlled Substances Act . . . or any other Federal law, an institution of higher education . . . or a State department of agriculture may grow or cultivate industrial hemp,” provided it is done “for purposes of research conducted under an agricultural pilot program or other agricultural or academic research” and those activities are licit under the relevant State’s laws. 7 U.S.C. § 5940(a). The Agricultural Act contemplates potential conflict between the Controlled Substances Act and preempts it. The Final Rule therefore does not violate the Agricultural Act.

The Consolidated Appropriations Act forbids the use of federal funds from being used “in contravention of . . . the Agricultural Act” or “to prohibit the transportation, processing, sale, or use of industrial hemp that is grown or cultivated in accordance with subsection section 7606 of the Agricultural Act of 2014.” Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 763, 129 Stat. 2242, 2285 (2015). Petitioners are not challenging the use of federal funds, but rather the validity of an agency rule. Their suggestion that the “promulgation of

the Final Rule likely required use of extensive DEA resources,” is not sufficient grounds to invalidate the Final Rule.

The Petition for Review is DENIED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>				
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	
Excerpt of Record	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
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Reply Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
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TOTAL:				\$ <input type="text"/>	TOTAL:				\$ <input type="text"/>

* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk