No. 17-70162

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

***Hemp Industries Association,* et al.,**

Petitioners,

v.

***Drug Enforcement Administration*, et al.,**

Respondents

PETITION FOR REVIEW OF RULES
OF DRUG ENFORCEMENT ADMINISTRATION

AMICUS BRIEF OF MEMBERS OF UNITED STATES CONGRESS IN SUPPORT OF PETITIONERS WITH CONSENT OF ALL PARTIES

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INTEREST OF AMICI

Amici, Senator Rand Paul (R-KY), Senator Ron Wyden (D-OR), Senator Jeff Merkley (D-OR), Representative Thomas Massie (R-KY-4), Representative Jared Polis (D-CO-2), Representative Darren Soto (D-FL-9), Representative Mark Pocan (D-WI-2), Representative Ed Perlmutter (D-CO-7), Representative Dina Titus (D-NV-1), Representative Juan Vargas (D-CA-51), Representative Diana DeGette 9 D-CO-1), Representative Peter DeFazio (D-OR-4), Representative Stephen Cohen (D-TN-9), Representative Barbara Lee (D-CA-13), Representative Tulsi Gabbard (D-HI-2), Representative Suzanne Bonamici (D-OR-1), Representative Earl Blumenauer (D-OR-3), Representative John Yarmuth (D-KY-3), Representative Gwen Moore (D-WI-4), Representative Glenn Grothman (R-WI-6), Representative Raul Grijavla (D-AZ-3), Representative Colleen Hanabusa (D-HI-1), Representative Donald Young (R-AK), Representative Thomas Garret, Jr. (R-VA-5), Representative Dana Rohrabacher (R-CA-48), Representative Walter B. Jones Jr. (R-NC-3), Representative Collin Peterson (D-MN-7), and Representative Eleanor Holmes Norton (D-DC), are current members of Congress who crafted the "Legitimacy of Industrial Hemp Research" section of the Agricultural Act of 2014, P.L. 113-79 § 7606 (7 U.S.C. § 5940) (hereinafter, the "Farm Bill"), and who were also similarly involved in the inclusion of the industrial hemp provisions in the Consolidated and Further Continuing

Appropriations Act, 2015, P.L. 113-235, and the Consolidated Appropriations Act, 2016, P.L. 114-113 (collectively, hereinafter, the "Spending Bill").

Based on their experiences, Amici are familiar with the Farm Bill and Spending Bill provisions enacted and the legislative process it took to enact the laws. Amici have an interest in ensuring that the Executive and Judicial branches construe the Farm Bill and the Spending Bill in accordance with their text and purpose, and seek to share their insight on these matters with this Court.

All parties have consented to the filing of this amicus brief. No counsel for any party authored the brief in whole or in part, nor did any person or entity other than *amici curiae* or their counsel make any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

After decades of careful consideration during 2013 and 2014, Congress took steps to authorize pilot programs to study the cultivation of and market for industrial hemp. It did so through the Farm Bill and Spending Bill. In passing these laws, Congress sought to clearly establish rules that both the Executive Branch and the individual States must follow in order to research the viability of industrial hemp as an agricultural crop.

The Farm Bill defines and clearly permits the growth, cultivation, and research of industrial hemp, under defined parameters. *See* Agricultural Act

of 2014, Pub. L. 113-79, title VII, § 7606 (codified at 7 U.S.C. § 5940 (2014)). This section of the Farm Bill (hereinafter, "Section 7606") defines "industrial hemp" as "the plant Cannabis sativa L. and *any part of such plant*, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." *Id.* (emphasis added). Notably, the Farm Bill's definition of industrial hemp includes any part of the plant, including the flower. Rather than having the distinction between "industrial hemp" and "marihuana" depend on the part of the Cannabis plant from which a product is derived (as it is under the Controlled Substances Act, discussed in depth below), the Farm Bill distinguished the two based on the *concentration* of the psychoactive compound tetrahydrocannabinol ("THC") contained in each product. In deciding to define "industrial hemp" based on THC content rather than the part of the Cannabis plant being used, Congress deliberately recognized that industrial hemp products derived from any part of the *Cannabis sativa* L. plant, including the flower, can be used for many industrial purposes and would not fall under the definition of "marihuana" set forth in the Controlled Substances Act (the "CSA"), so long as the plant was cultivated to be below 0.3% THC concentration. *See* 21 U.S.C. § 801 *et seq.*

Because the CSA is implemented through a process of administrative decision making, largely through the Drug Enforcement Agency ("DEA"), Section

7606 was drafted to guide the actions of DEA. The legislation evolved through a lengthy process of public discussion, including direct dialogue with DEA and Department of Justice ("DOJ") officials. Congress crafted the text to ensure that the law conveyed industrial hemp's definition clearly and unambiguously to DEA to guide its administrative rulemaking. This brief addresses the evident fact that DEA did not properly interpret the text of the statute.

Despite Congress's enactment of the Farm Bill in 2014, the DEA attempted several enforcement actions against participants of Farm Bill-compliant industrial hemp pilot programs, prominently including a seizure of hemp seeds owned by the University of Kentucky.[1] Thereafter, Congress passed the Spending Bill provisions, expressly prohibiting the government from spending funds in contravention of the Farm Bill, and further prohibited DEA from interfering with the interstate transportation of industrial hemp grown pursuant to the Farm Bill. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 763, 129 Stat. 1175, 2285 (2016).

Congress wrote these bills, an exercise of Congress's express and exclusive Article I power of the purse, to emphasize the significance of the Farm Bill. Many in Congress were concerned that DEA would ignore or subvert the Farm Bill, and

[1] Ryan Grim & Matt Ferner, *DEA Seizes Kentucky's Hemp Seeds Despite Congressional Legalization*, HUFFINGTON POST (May 14, 2014, 5:01 PM), https://www.huffingtonpost.com/2014/05/13/dea-seizes-kentuckys-hemp_n_5318098.html.

in passing this bill, showed that Congress expected the Executive Branch to adhere to the law.

Despite Congress passing clear text on industrial hemp into law, the DEA now seems to be effectuating the opposite. On December 14, 2016, the DEA published the Establishment of a New Drug Code for Marihuana Extract (the "Final Rule"), creating a new code number under the CSA for "marihuana extract." However, the definition is so broad that it encompasses industrial hemp extracts. The Final Rule defined "marihuana extract" as an "extract containing one or more cannabinoids that has been derived *from any plant of the genus Cannabis*, other than the separated resin (whether crude or purified) obtained from the plant." *Establishment of a New Drug Code for Marihuana Extract*, U.S. DEP'T OF JUSTICE, DRUG ENFORCEMENT ADMIN., https://www.deadiversion.usdoj.gov/fed_regs/rules/2016/fr1214.htm (last visited Jan. 2, 2018). The Final Rule explicitly stated that "[e]xtracts of marihuana will continue to be treated as Schedule I controlled substances." *Id.* The Final Rule is specific in targeting one particular non-intoxicating cannabinoid, cannabidiol ("CBD"): "if it were possible to produce from the cannabis plant an extract that contained only CBD and no other cannabinoids, such an extract would fall within the new drug code [for marihuana extract] 7350."

Subsequently, the DEA released a "Clarification of the New Drug Code (7350) for Marijuana Extract" which explained that the Final Rule "includes only those extracts that fall within the CSA definition of marijuana" and "does not include materials or products that are excluded from the definition of marijuana set forth in the [CSA]." *Clarification of the New Drug Code (7350) for Marijuana Extract*, U.S. DEP'T OF JUSTICE, DRUG ENFORCEMENT ADMIN., https://www.deadiversion.usdoj.gov/schedules/marijuana/m_extract_7350.html (last visited Jan. 2, 2018). The DEA asserts that its Final Rule and creation of a new drug code for "marihuana extract" is consistent with the definition of "marihuana" in the CSA.

This is problematic in several respects. Industrial hemp belongs to the genus Cannabis and also contains one or more cannabinoids. Cannabinoids are chemical compounds produced in the flower (trichomes) of all plants genus Cannabis, including all industrial hemp. The DEA's broad definition of marihuana extract set forth in the Final Rule makes the presence of any cannabinoid in any extract of the Cannabis plant technically "marijuana" and illegal. Through Section 7606, Congress explicitly defined "industrial hemp" as the Cannabis plant with a THC content of "not more than 0.3%." In defense of its action, the DEA has asserted that *all* cannabinoids are controlled substances by virtue of the fact that they are concentrated in the flower of Cannabis plants. This argument may have had merit

prior to the Farm Bill, but it is blatantly contrary to the text of the Farm Bill, which explicitly exempted all parts of industrial hemp, including its flower, from the definition of marijuana. The DEA's position in the Final Rule that industrial hemp extracts "will continue to be treated as Schedule I controlled substances" therefore exceeds the DEA's authority, and also subverts the Congressional definition of industrial hemp contained in the Farm Bill, which allows States the right to define their own industrial hemp laws and regulations.

Through the Farm Bill and Spending Bill, Congress resolved much of the long-standing tension regarding industrial hemp. Congress passed a law that chose a path of non-interference with industrial hemp legalization in States that wished to explore economic growth opportunities with the crop. Congress made this decision in the face of DEA's longstanding views. While Congress and DEA disagreed, Congress resolved the disagreement through the plain language of the Farm Bill and Spending Bill. The DEA still does not agree, which is the crux of this case. Notwithstanding the clear text written by Congress, the DEA's Final Rule lists "marihuana extract" as a controlled substance and defines "marihuana extract" so broadly that it includes industrial hemp extracts.

Amici seek to provide insight on the Farm Bill, Spending Bill, and how the Final Rule is at odds with these bills. We ask the Court to recognize and honor the

actions and purpose of Congress, and to find that the Final Rule was an abuse of DEA's administrative procedure and rulemaking authority.

ARGUMENT

I. THROUGH SECTION 7606 OF THE FARM BILL AND SUBSEQUENT APPROPRIATIONS, CONGRESS SOUGHT TO PROHIBIT THE FEDERAL GOVERNMENT FROM INTERFERING WITH STATES THAT AUTHORIZED PILOT PROGRAMS FOR INDUSTRIAL HEMP.

"It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). In passing Section 7606 of the Farm Bill and subsequent appropriations bills, Congress sought to expressly allow states that chose to experiment with the cultivation of industrial hemp to do so without fear of Federal interference. Amici helped craft or subsequently supported these laws. To assist the Court in understanding why Congress took the action it did, Amici will briefly explain how and why these provisions became law.

A. Overview of the Farm Bill.

Among many other policy choices important to American farmers and the country at large, the omnibus Farm Bill debate during the 113th Congress considered a number of changes to U.S. policy surrounding industrial hemp. Amici

Representative Earl Blumenauer (D-OR-3), when introducing the House version of the Farm Bill, began by expressing his outrage over then-existing federal impediments to reasonable state hemp legislation: "Nineteen States have passed pro-industrial hemp legislation; nine States removing barriers to its production altogether. These products are legal in the United States […] but it just has to be grown someplace else." *Federal Agriculture Reform and Risk Management Act of 2013: Hearing on H.R. 1947*, 113th Cong. Rec. H3898 (2013) (statement of Rep. Blumenauer). Prior to the enactment of the Farm Bill, DEA's interpretation of federal law made it prohibitively difficult for States that wanted to experiment with hemp cultivation from doing so.

To put an end to this roadblock, Congress chose to act in a bipartisan manner. Representatives Thomas Massie (R-KY-4), Jared Polis (D-CO-2), and Blumenauer introduced an amendment to the House Farm Bill to allow institutions of higher education to cultivate industrial hemp for agricultural or academic research in states that already permit the cultivation of industrial hemp. *See* Federal Agriculture Reform and Risk Management Act of 2013, H.R. 1947, 113th Cong. (2013). In the Senate, then-Minority (now Majority) Leader Mitch McConnell (R-KY) and Senators Ron Wyden (D-OR), Rand Paul (R-KY), and Jeff Merkley (D-OR) introduced Senate Amendment 952 (hereinafter, "S.A. 952"), to the Senate Farm Bill, S. 954. This amendment directly amended the CSA to exclude industrial

hemp from the definition of marijuana and therefore allow state law on industrial hemp to govern. *Text of Amendments,* 113th Cong. S. 3629 (2013); *see* Agriculture Reform, Food and Jobs Act of 2013, S. 954, 113th Cong. (2013). Ultimately, during conference on the House and Senate bills, the House adopted an amended version of H.R. 1947, which included language from S.A. 952. H.R. Rep. No. 113-333, at 508 (2014) (Conf. Rep.). As the Conference Report notes, "[t]he amendment authorizes an institution of higher education or State department of agriculture to grow or cultivate industrial hemp for research purposes if the laws of the State permit its growth and cultivation." *Id.* This language became Section 7606 of the Farm Bill, which President Obama signed into law on February 7, 2014.

The Farm Bill set forth the following grounds for legitimate and legal growth, cultivation, manufacture, and research of industrial hemp:

> (a) ***Notwithstanding*** the Controlled Substances Act (21 U.S.C. 801 et seq.), chapter 81 of title 41, . . . or any other Federal law, an institution of higher education (as defined in section 1001 of [title 20]) or a State department of agriculture may grow or cultivate industrial hemp if—
>
> (1) the industrial hemp is grown or cultivated for purposes of research conducted under an agricultural pilot program or other agricultural or academic research; and
>
> (2) the growing or cultivating of industrial hemp is allowed under the laws of the State in which such institution of higher education or State department of agriculture is located and such research occurs.

7 U.S.C. § 5940(a) (emphasis added). Section 7606 of the Farm Bill defines "industrial hemp" as "the plant *Cannabis sativa* L. and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C. § 5940(b)(2). The term "agricultural pilot program" is defined as:

> a pilot program to study the growth, cultivation, *or marketing* of industrial hemp—
>
> (A) in States that permit the growth or cultivation of industrial hemp under the laws of the State; and
>
> (B) in a manner that—
>
> > (i) ensures that only institutions of higher education and State departments of agriculture are used to grow or cultivate industrial hemp;
> >
> > (ii) requires that sites used for growing or cultivating industrial hemp in a State be certified by, and registered with, the State department of agriculture; and
> >
> > (iii) authorizes State departments of agriculture to promulgate regulations to carry out the pilot program in the States in accordance with the purposes of this section.

7 U.S.C § 5940(b)(1)(emphasis added).

The Farm Bill expressly allows two broad categories of activity for institutions of higher education and State departments of agriculture, namely: (1) permitting the growth and cultivation of industrial hemp, including the flower, and (2) carrying out pilot programs operating under state law without the need of additional DEA approval.

The Farm Bill also included an important—and specific—definition meant to differentiate permissible industrial hemp from impermissible marijuana. In establishing the definition of "industrial hemp" set forth in the Farm Bill, Congress specifically elected to define legal industrial hemp based on the level of THC concentration, rather than by the part of the Cannabis plant from which the industrial hemp, or its derivatives, were created. Congress made clear that this THC-based approach was controlling, "notwithstanding" any contrary provisions of the CSA or any other law. 7 U.S.C. § 5940; *see generally United States v. Novak*, 476 F.3d 1041, 1047-48 (9th Cir. 2007) (interpreting "statutory 'notwithstanding' clause" and holding that it provided an "explicit statutory override" of referenced statute). In sum, the Farm Bill clearly established that states could determine on their own whether to allow cultivation of industrial hemp. In addition, it provided a new definition of industrial hemp explicitly based on THC content alone, and ensured that the new definition would take precedence "notwithstanding" the CSA.

B. Farm Bill Pilot Programs Were Meant To Allow The Study Of A Commercial Market For Industrial Hemp and Products Derived Therefrom.

The Farm Bill was, in places, intentionally broad in order to encompass activities including the study of the market for industrial hemp ("a pilot program to study the growth, cultivation, *or marketing* of industrial hemp") (emphasis added),

and to permit states to select partners to assist with the growth and cultivation of industrial hemp. In other places, the language is specific, for instance by defining "industrial hemp" as "the plant *Cannabis sativa* L. and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis."

Congress recognized the need for research and development to investigate market potential of domestic industrial hemp agriculture, including hemp agronomics, the economic impact of hemp-derived cannabinoids such as CBD, diversion controls, and the overall hemp products retail market. The Farm Bill granted States broad discretion to act as incubators for the development of domestic hemp research policy and markets. States and institutions of higher education—and where allowed by state law or regulation, their public or private sector partners—were given the freedom, flexibility, and latitude to try new methods and applications that are essential to the success of any pilot program, including those relating to industrial hemp.

The Farm Bill allows institutions of higher education and State departments of agriculture and their partners and licensees (if allowed under state law and regulation) to research the growth, cultivation, and marketing of industrial hemp that comports with a THC-specific definition, and carry out pilot programs operating under state law without the need of additional DEA approval. The Farm

Bill specifies that this research could be directed to the "marketing of industrial hemp." 7 U.S.C. § 5940(b)(1). Through the addition of this clause, Congress clearly did not intend for research of industrial hemp to be limited to cultivation in a lab followed by disposal of the byproduct. Rather, the purpose of the Farm Bill was to allow State departments of agriculture and institutions of higher education to undertake research related to marketing and commercial activity, employment data, exports, product development, retail market development, diversion controls, and public policy. Through the marketing provision, Congress legalized the underlying commercial activity. This included any commercial marketing of industrial hemp extracts and derivatives, so long as the products fell under the THC threshold level. Congress did not restrict, nor even purport to define or limit under federal law, the myriad research and marketing-related activities the States might authorize and monitor.

The fact that the Farm Bill clearly contemplated experimentation with a commercial market for industrial hemp is underscored by passage of the Spending Bill provisions, which prohibit DEA from spending funds to "prohibit [the] transportation, processing, sale, or use of industrial hemp that is grown or cultivated in accordance with Section 7606 of the Agricultural Act of 2014, within or outside the State in which the industrial hemp is grown or cultivated." Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 763, 129 Stat.

1175, 2285 (2016). This language assumes that industrial hemp grown pursuant to the Farm Bill will be sold and transported within and between states.

This structure inevitably allowed for commercial activities. It is hard to imagine how States might accomplish the foreseen "marketing of industrial hemp," including "transportation, processing, sale of use of industrial hemp" without public-private partnerships, State licensure of private individuals and corporations, and other collaborations that the State or educational institutions deemed necessary. Moreover, "marketing" certainly included commercial activity that would be studied, as well as the research and development of manufacturing, refinement, and marketing techniques for sales of industrial hemp and its derivative products. The Farm Bill resolved the tension between the DEA and the states by expressly allowing states to have industrial hemp industries.

C. DEA Actions Subsequent To The Enactment Of The Farm Bill Lead Congress To Use Its Article I Power Of The Purse To Restrict DEA Interference With State Authorized Industrial Hemp Pilot Programs.

Following the DEA's attempted enforcement actions against Farm Bill-compliant industrial hemp pilot programs, and to underscore the meaning of Section 7606, Congress passed the Spending Bill on December 18, 2015, expressly prohibiting federal funds from being used "(1) in contravention of Section 7606 of the Agricultural Act of 2014 (7 U.S.C. 5940); or (2) to prohibit transportation, processing, sale, or use of industrial hemp that is grown or cultivated in accordance

with Section 7606 of the Agricultural Act of 2014, within or outside the State in which the industrial hemp is grown or cultivated." Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 763, 129 Stat. 1175, 2285 (2016).

Taken together, the Farm Bill and the Spending Bill specified that the DEA—or any other law enforcement agency—could not take any action, even allegedly in furtherance of the CSA, which would contradict any activity defined as lawful under the Farm Bill.

II. THE DEA'S STATEMENT OF PRINCIPLES AND FINAL RULE IGNORE CONGRESSIONAL PURPOSE IN PASSING THE FARM BILL AND THE SPENDING BILL AND CONTRADICT THE EXPRESS PROHIBITIONS CONTAINED IN BOTH LAWS.

Subsequent to the passage of the Farm Bill and Spending Bill, the DEA issued (i) a joint Statement of Principles regarding industrial hemp, and (ii) a Final Rule regarding "marihuana extracts." DEA's policy statement and Final Rule violate both the express wording and implicit purpose of Congress contained in the Farm Bill and Spending Bill.

A. The DEA's Statement Of Principles Regarding Industrial Hemp Contravenes The Farm Bill.

On August 12, 2016, the U.S. Department of Agriculture, the Food and Drug Administration, and the DEA issued a joint statement as guidance to inform the public how federal law "applies to activities associated with industrial hemp that is grown and cultivated in accordance with Section 7606 of the Agricultural Act of

2014." Statement of Principles on Industrial Hemp, 81 Fed. Reg. 53395 (Aug. 12, 2016) (codified at 21 C.F.R. § 1308.11(d)(58)) (hereafter, the "SOP"). As Senate Majority Leader Mitch McConnell noted in his October 6, 2016 letter to then-Secretary of Agriculture Thomas Vilsack, the DEA, in the SOP, narrowed the Congressional definition of "Industrial Hemp" "beyond what Congress explicitly prescribed in the Agricultural Act of 2014 [the Farm Bill]." In the SOP, DEA subtly, but significantly, attempted to limit the scope of activity legalized under the Farm Bill. Specifically, the SOP adds language to the Farm Bill definition of industrial hemp which appears to be an attempt to exclude the "flower" from the statutory definition of industrial hemp, and also seeks to narrow the scope of legal hemp activity exclusively to industrial use.

Compare the simple language of Section 7606 with the DEA's reinterpretation as stated in the SOP:

> Section 7606:
>
> Industrial hemp. – The term "industrial hemp" means the plant Cannabis sativa L. and any part of such plant, whether growing or not, with a detla-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis."
>
> SOP:
>
> The term "industrial hemp" includes the plant *Cannabis sativa* L. and any part or derivative of such plant, *including seeds of such plant*, whether growing or not, *that is used exclusively for industrial purposes (fiber and seed)* with a tetrahydrocannabinols concentration of not more than 0.3 percent on a dry weight basis.

> *The term 'tetrahydrocannabinols' includes all isomers, acids, salts, and salts of isomers of tetrahydrocannabinols*.

(emphasis added). Notably, the DEA definition added the phrases "including seeds of such plant" and "[t]he term 'tetrahydrocannabinols' includes all isomers, acids, salts, and salts of isomers of tetrahydrocannabinols" to the definition of "industrial hemp" set forth in the Farm Bill. It also appears to restrict "industrial hemp" to only "that [which] is used exclusively for industrial purposes (fiber and seed)." The Farm Bill did not limit the definition of legal industrial hemp to fiber and seed, nor did it limit non-industrial use. Accordingly, the "principle" at the core of the DEA statement was that DEA did not intend to follow the direction of Congress.

In addition, the SOP limits the provisions of the Farm Bill related to the study of marketing for and marketing of industrial hemp. The SOP states:

> For purposes of marketing research by institutions of higher education or State departments of agriculture (including distribution of marketing materials), but not for the purpose of general commercial activity, industrial hemp products may be sold in a State with an agricultural pilot program or among States with agricultural pilot programs but may not be sold in States where such sale is prohibited. Industrial hemp plants and seeds may not be transported across State lines.

81 Fed. Reg. 53395. This, of course, contravenes not only the Farm Bill but the Spending Bill as well, which prohibits DEA from spending any funds to interfere with the interstate transportation of industrial hemp grown pursuant to the Farm Bill. For these reasons, Senator McConnell noted in his October 2016 letter that, "Federal law, however, does not limit the ability to sell

lawfully grown industrial hemp products only to states with agricultural pilot programs." Senator McConnell's understanding of the Farm Bill—consistent with the text Congress passed—presumes that sales of industrial hemp products are part and parcel of a pilot program authorized by law.

While DEA acknowledged the language of the Farm Bill in the SOP, it nevertheless asserted that "the statute left open many questions regarding the continuing application of Federal drug control statutes to the growth, cultivation, manufacture, and distribution of industrial hemp products, as well as the extent to which growth by private parties and sale of industrial hemp products are permissible." 81 Fed. Reg. 53395.

The SOP implies that the DEA is the body to appropriately determine what Congress meant.

Despite the clear text of Congress, DEA has attempted to curtail both private sector participation in pilot programs and marketing activities related to pilot program industrial hemp. In a letter addressed to the Chairman of the National Hemp Association, DEA Chief Liaison James Arnold states that private parties are prohibited from participation in state industrial hemp pilot programs, writing, "many people mistakenly believe that, under Section 7606, anyone (not just State departments of agriculture and institutions of higher education) may grow cannabis and produce 'hemp' products. Further, some seem to think that Section 7606 – the

stated purpose of which is to allow 'research' with industrial hemp – may be used for what most reasonable people would characterize as purely commercial endeavors rather than bona fide 'research.'" DEA Letter to National Hemp Association, September 15, 2017. This is a gross misinterpretation of the Farm Bill and Spending Bill.

Amici assert that the language of the Farm Bill and the history leading to its passage show a clear purpose on behalf of Congress to answer many of the questions DEA believes Congress "left open."

B. Subsequent To The SOP, DEA Published The Final Rule, Which Circumvents The Farm Bill And Spending Bill.

Undeterred by Congressional, public, and private sector concerns about the SOP, in December 7, 2016, the DEA published the "Establishment of a New Drug Code for Marihuana Extract" (the "Final Rule") (codified at 21 C.F.R. § 1308.11(d)(58)). The Final Rule created a new code number for "marihuana extract," which is defined as an "extract containing one or more cannabinoids that has been derived from any plant of the genus Cannabis, other than the separated resin (whether crude or purified) obtained from the plant." *Id.*

DEA confirmed this position in the "Clarification of the New Drug Code (7350) for Marijuana Extract" (the "Clarification") issued in response to public inquiries related to the Final Rule's treatment of cannabinoids as controlled substances. In defense of its action, the DEA essentially restated the definition of

marihuana in the CSA.[2] DEA purported not to add any substance to the schedules controlled under the CSA through the Final Rule, but rather created a drug code for a "subset of what has always been included in the CSA definition of marijuana." *Id.* However, such an argument necessarily implies that industrial hemp derived cannabinoids were, prior to the Final Rule, in fact, controlled substances.

The Clarification states that "cannabinoids, such as tetrahydrocannabinols (THC), cannabinols (CBN) and cannabidiols (CBD), are found in the parts of the cannabis plant that fall within the CSA definition of marijuana, such as the flowering tops, resin, and leaves." *Id.* While the DEA clearly believes that all extracts of the Cannabis flower fall under the definition of controlled substances, such an assertion blatantly subverts the Farm Bill, which explicitly permits any part of the Cannabis plant, including the flower, with "not more than 0.3 percent" THC, from being deemed permissible industrial hemp under an approved pilot program. The DEA is wrong to treat cannabinoids as evidence that a compound was derived from marijuana since legal cannabinoids also come from the flower of the plant.

Although DEA intended to fill in the gaps allegedly left open by the Farm Bill, the plain language of Section 7606's definition of industrial hemp did not leave gaps. The DEA undercut both the Farm Bill and the Spending Bill by issuing

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[2] *Available at* https://www.deadiversion.usdoj.gov/schedules/marijuana/m_extract_7350.html (last visited Jan. 2, 2018).

the SOP and the Final Rule, including guidelines that construed the CSA more broadly than written and the Farm Bill more narrowly than written.

C. The Final Rule Runs Contrary to the Legislative Purpose of the Farm Bill By Narrowing the Scope of Legal Industrial Hemp and By Hindering Economic Growth and Research Initiatives.

Although the Final Rule and the SOP purport to work in conjunction with the Farm Bill, the language DEA set forth is inconsistent with the language of the Farm Bill (and also violates the Spending Bill) because it adopts a definition for "marihuana extract" which (i) unduly broadened the definition of marihuana set forth in the CSA, adding new controlled substances (cannabinoids) to the CSA, and (ii) unlawfully limits the scope of lawful "industrial hemp" cultivation, growth, and research previously deemed legal under the Farm Bill. The definition of "marihuana extract" in the Final Rule is unduly broad and encompasses lawful activity set forth under the Farm Bill; in fact, it effectively repeals Section 7606 of the Farm Bill.

Cannabinoids are chemical compounds produced in the flower (trichomes) of all Cannabis plants, including industrial hemp. With the exception of THC, which is individually scheduled, no cannabinoids appear on any CSA Schedule of controlled substances and none, other than THC, are intoxicating or produce any psychotropic reactions, even when consumed in a very large quantity. This overly-broad definition of "marihuana extract" would include products and extracts

derived from industrial hemp, such as CBD extracts. This would effectively criminalize as a Schedule I drug these currently legal industrial hemp products and extracts, even when grown, cultivated, and studied in accordance with an agricultural pilot program under the Farm Bill. By including these extracts in the Final Rule, it subjects the extracts to DEA enforcement powers, including seizure of the products and federal criminal prosecution of those manufacturing, distributing, and consuming them. This cannot be justified in light of Congress's express action in this area.

The Final Rule's definition of "marihuana extract" directly conflicts with the plain language of the Farm Bill. The DEA's Final Rule could have defined "marihuana extract" as "an extract from marihuana (Controlled Substance Code 7360)," or could have included language that stated the following: "Notwithstanding anything contained in this rule, the Agency is not intending to limit, modify, amend, nullify or contradict the express provisions of the Farm Bill with respect to the growth, cultivation and research of "industrial hemp" (as defined therein) and to the extent of any inconsistency between this rule and the Farm Bill, the Farm Bill will govern." No such deference was included.

The legalization of industrial hemp by the Farm Bill, including "any part of the plant…with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent," applies to any intended uses of industrial hemp that meet the Farm Bill's

outlined criteria, including any derivatives or extracts thereof. It would be illogical for a non-intoxicating derivative of a non-scheduled legal plant to become a controlled substance. Additionally, raw hemp itself is not a product. Unlike other agricultural commodities, such as corn or strawberries, industrial hemp only has utility once processed, manufactured or otherwise modified. DEA's implied argument that Congress intended to conditionally legalize industrial hemp, but at the same time criminalize a derivate therefrom, is flawed logic and an incorrect interpretation of the statute. The Farm Bill implicitly gives equal status to all products and derivatives that may be extracted from any cannabis plant which fall below 0.3% THC and thereby qualify as industrial hemp under the Farm Bill. Thus, by suggesting that extracts from industrial hemp differ in legal status from the plant itself, the Final Rule on "marihuana extract" contravenes the plain text of the Farm Bill and the Congressional purpose underlying the statute.

Amici reiterate what the congressional records for both the House and the Senate make clear, which is that the purpose and intention of Section 7606 of the Farm Bill is to legalize industrial hemp when grown, cultivated, studied, and marketed under certain conditions, as clearly outlined therein. As Amici Representative Massie explained during the initial floor debate of H.R. 1947 on June 19, 2013, "[t]his is not about drugs. This is not about a drugs bill. This is about jobs. And for […] farmers […], we need the opportunity to compete

globally, in a global market, and we shouldn't be denied this outlet for another productive crop […]." *Federal Agriculture Reform and Risk Management Act of 2013: Hearing on H.R. 1947*, 113th Cong. Rec. H3897-98 (2013)(statement of Rep. Massie). Representative Andy Barr (R-KY-6) expounded on Representative Massie's statements by explaining "[i]t will allow research institutions to grow industrial hemp helping us to gain information we need to consider expansion of productions. We need this to demonstrate the profitability and usefulness for our farmers." *Id.* (statement of Rep. Barr). In summation, Amici Representative Blumenauer concluded that,

> [w]hat this amendment does is to simply permit the research opportunities for college and universities to grow and cultivate hemp for academic and agricultural research purposes. If this amendment passes and we're able to do this research in agricultural colleges and universities, then we're not going to have stupid talking points from DEA and won't have misleading statements made, people will understand why other countries have been able to figure this out and the United States will be able. Nobody, regardless of your position on this, should be opposed to allowing our research colleges and universities to do a deep dive into what is possible.

Id. (statement of Rep. Blumenauer).

Similarly, Amici Senator Wyden explained that the language of the CSA as it then existed "prevents America's farmers from growing industrial hemp. What is worse, this regulation is hurting job creation in rural America and increasing our trade deficit." *Agriculture Reform, Food, and Jobs Act of 2012: Hearing on S.3240*, 112th Cong. Rec. S4138 (2012)(statement of Senator Wyden). Senator

Wyden went on to say that if "this farm bill is about empowering farmers and increasing rural jobs, let's give them tools they need to get the job done. Let's boost revenue for farmers and reduce the overhead costs for the businesses around the country that use this project. And let's put more people to work growing and processing an environmentally friendly crop with a ready market in the United States." *Id.* at S4139. This purpose was accomplished through the operative language of Section 7606.

DEA's Final Rule is at odds with the express purpose of Congress and the plain language of the Farm Bill. In attempting to make distinctions that cut against the Farm Bill's express language, DEA is redefining "industrial hemp" and making parts of the plant that Congress expressly exempted from the CSA—because they *lack* psychoactive substances and effects—and products made therefrom, Schedule I drugs. Congress simply did not intend for the DEA to be able to redefine marijuana in such a way as to encompass what it explicitly defined as "industrial hemp," no matter what part of the plant it comes from. Congress clearly stated in the text of the Farm Bill that the dividing line between industrial hemp and marijuana is the THC level, *see* 7 U.S. Code § 5940(b)(2), and by its terms the Farm Bill's definition controls, "notwithstanding" any conflicting definition that might apply under the CSA, *see* § 5940(a). DEA's argument in the SOP and Final Rule that Congress intended to legalize the growth and cultivation of hemp in

connection with agricultural pilot programs, but at the same time criminalize hemp derivatives or extracts, is a flawed and incorrect interpretation of the statutes that Amici have supported and which Congress, as a body, has passed. It is inappropriate for DEA to impose such additional restrictions that effectively recriminalize zones of conduct that Congress allowed, especially in the absence of any statutory authorization for such action.

In enacting the Farm Bill, it was Congress's purpose that industrial hemp and any derivatives, extracts, and uses thereof would be exempted from the definition of "marihuana" under the CSA. We know this because many of us helped draft the provisions and voted for them.

Through the Final Rule, DEA is stifling economic development and commercial exploration of industrial hemp. It is undercutting the legislative text of Section 7606 of the Farm Bill by prohibiting marketing research of industrial hemp-derived extracts under an agricultural pilot program. This is the very opposite of what Congress passed into law and the purpose behind it.

CONCLUSION

In drafting and passing the Farm Bill, Congress clarified U.S. drug policy regarding industrial hemp, and identified the level of THC as the relevant psychoactive component which would trigger the terms of the CSA and constitute unlawful conduct. Congress passed the Farm Bill, indicating that industrial hemp is

a safe and beneficial agricultural crop which should not be treated as a drug, so long as it met the defined THC threshold. While the Farm Bill pilot programs fell short of the full legalization some Members desired, the pilot programs provided enough latitude to allow for a growing body of knowledge regarding the viability of a domestic hemp market. Congress recognized and acknowledged the need for research and development to investigate hemp-derived products, including CBD, and gave states broad discretion to create pilot programs to accomplish this research. The Final Rule is inconsistent with the Farm Bill's most fundamental purpose: to allow states that wish to experiment with commercial research and development of industrial hemp, including extracts and derivatives therefrom, to do so without interference from the DEA. The Spending Bill reinforced the text of this law.

The Farm Bill put no limitation on States' authority to implement pilot programs or to license or register private parties, companies, investors, and others to participate pursuant to state law and regulation, so long as such activity fits within the confines of the Farm Bill. The Spending Bill makes clear that Congress anticipated that such participation would include marketing activities.

The Final Rule (and the SOP), and all DEA statements made in relation to these documents, provide an unreasonable interpretation of the wording of the Farm Bill and Congress's purpose behind the law, and in turn violate the Spending

Bill. If fully implemented, the Final Rule will serve to criminalize agricultural products and activities which recently-enacted legislation legalized. In the meantime, the Final Rule has already stifled economic development and caused unjust confusion in the nascent U.S. industrial hemp industry.

Therefore, Amici asks the Court to recognize and honor the actions and purpose of Congress and to hold that the Final Rule was an abuse of DEA's administrative rulemaking authority and otherwise not in accordance with law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Steven A. Cash, counsel for *amicus curiae* Members of United States Congress, hereby certifies that this brief and motion comply with the consent and length requirements of Rules 29(a)(4)-(5) and 32-1(a) of the Federal Rules of Appellate Procedure Ninth Circuit Rules. According to the word count feature of the word processing program used to prepare this brief, the brief contains 6,595 words, excluding those parts of the brief exempted by Rule 32(f), which is less than half of the words allowed for principal briefs under Federal Rules for Appellate Procedure Ninth Circuit Rules 32-1(a). This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure Ninth Circuit Rules 32(a)(4)-(7) as it is written in Times New Roman 14 point font.

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. I certify that I am a registered CM/ECF user and that all parties have registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 11, 2018

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