U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave. NW, Rm. 7511
Washington, DC 20530

Tel: (202) 514-4027

March 28, 2018

VIA CM/ECF

Molly C. Dwyer, Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
95 7th Street
San Francisco, CA 94103

RE: *Hemp Industries Ass'n et al. v. U.S. Drug Enforcement Admin. et al.*, No. 17-70162 (9th Cir.) (argued on Feb. 15, 2018)

Dear Ms. Dwyer:

I write on behalf of respondents in response to the letter that petitioners filed with the Court on March 22, 2018.

"Rule 28(j) permits a party to bring new *authorities* to the attention of the court; it is not designed to bring new evidence through the back door." *Trans-Sterling, Inc. v. Bible*, 804 F.2d 525, 528 (9th Cir. 1986). But even if petitioners' document were properly before the Court, it would be irrelevant to the issues in this case. It does not interpret or apply (or even mention) the regulation that petitioners challenge in this proceeding, DEA's regulation establishing a new identification number for "marijuana extract." Nor does it in any way refer to petitioners.

The document is also consistent with the positions the government has taken in this litigation. The document states that cannabidiol "is a naturally occurring constituent of marihuana," as defined in the Controlled Substances Act. As we have already explained, DEA has relied on scientific evidence to conclude that "only the controlled parts of the [cannabis] plant contain non-trace amounts of cannabinoids." DEA Br. 26-29. Petitioners have never submitted contrary evidence to the agency, despite ample opportunity. And, as we have likewise explained, if a product consisting solely of exempt parts of the cannabis plant

contained trace amounts of cannabinoids, DEA guidance makes clear that such product would not be included in the drug code that petitioners challenge. *See* DEA Br. 10-12, 27 (citing DEA, Diversion Control Division, *Clarification of the New Drug Code (7350) for Marijuana Extract*, https://www.deadiversion.usdoj.gov/schedules/marijuana/m_extract_7350.html); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997).

Petitioners' new document also does not support their claim under the industrial-hemp provision of the Agricultural Act of 2014. As we explained, *see* DEA Br. 31-33, the industrial-hemp provision applies "[n]otwithstanding the Controlled Substances Act . . . or any other Federal law." 7 U.S.C. § 5940(a). The document petitioners have submitted merely interprets the Controlled Substances Act; it does not purport to override Section 5940(a) (and it certainly does not indicate that the regulation challenged here purports to do so).

Sincerely,

/s/ Sarah Carroll

Sarah Carroll
Counsel for Respondents

cc: All counsel (via CM/ECF)