

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BIG SKY SCIENTIFIC LLC,)
)
Plaintiff,)
)
v.)
)
IDAHO STATE POLICE, ADA COUNTY,)
JAN M. BENNETTS, in her official)
Capacity as Ada County Prosecuting)
Attorney,)
)
Defendants.)
_____)

Case No. 1:19-cv-00040-REB

MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE* AND FILE BRIEF IN SUPPORT OF BIG SKY SCIENTIFIC LLC’S EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Comes now U.S. Hemp Roundtable, Inc. (“Roundtable”), by and through counsel, and hereby moves the Court for leave to appear as *amicus curiae* and file the brief submitted herewith in support of the Emergency Motion for Temporary Restraining Order and Preliminary Injunction (“Emergency Motion”) of Plaintiff, Big Sky Scientific LLC (“Big Sky”).

In support of its motion, the Roundtable states that “this Court has broad discretion to appoint *amicus curiae*.” *Knox v. U.S. Dep’t of Interior*, No. 4:09-CV-162-BLW, 2011 WL 2837219, at *1 (D. Idaho July 9, 2011) (internal quotations omitted). Appointing the Roundtable as *amicus curiae* will assist the Court in resolving this case. In particular, the Roundtable will lend guidance with respect to Congress’ intent behind the Agriculture Improvement Act of 2018, the enactment of which the Roundtable successfully lobbied for and which squarely addresses the legal issues at stake in this case.

Moreover, as the hemp industry’s leading business advocacy organization and with sixty-plus members representing all aspects of the seed-to-sale distribution chain, the Roundtable has

critical understanding of the potential market impact if hemp-derived products were frustrated in interstate commerce, also directly at issue in this case.

For these reasons, the Roundtable respectfully requests this Court's appointment as *amicus curiae* and that the Court file the brief submitted herewith in support of Big Sky's Emergency Motion.

Respectfully submitted,

/s/ Richard E. Plymale

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*Counsel for U.S. Hemp Roundtable, Inc.,
seeking appointment as amicus curiae*

CERTIFICATE OF SERVICE

I hereby certify that I filed a true and accurate copy of the foregoing with the Clerk of Court via the Court's CM/ECF system on this 7th day of February, 2019, which will send a notice of electronic filing to all attorneys of record.

/s/ Richard E. Plymale

*Counsel for U.S. Hemp Roundtable, Inc.,
seeking appointment as amicus curiae*

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BRIEF OF *AMICUS CURIAE*
U.S. HEMP ROUNDTABLE, INC.

Respectfully submitted,

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2018 Farm Bill Conference Report 115-1072, 737 (available at <https://www.congress.gov/115/crpt/hrpt1072/CRPT-115hrpt1072.pdf>)

STATEMENT OF INTEREST

U.S. Hemp Roundtable, Inc. (“Roundtable”) has direct and unrepresented interest in this litigation. A 501(c)(4) nonprofit organization, the Roundtable engages in national advocacy efforts on behalf of its members, including for the full legalization of hemp and hemp-derived consumer products at the federal and state levels and the unimpeded shipment and transportation of hemp and hemp-derived consumer products in interstate commerce. With sixty-plus members representing all aspects of the seed-to-sale hemp distribution chain, in the two years since its formation, the Roundtable has become the United States’ leading business advocacy organization for the hemp industry. Its successes ring throughout Washington, D.C., as well as state capitals across the country.

In 2018, the Roundtable achieved its primary mission by successfully lobbying for and securing passage of the federal Agriculture Improvement Act of 2018 (“2018 Farm Bill”), which passed Congress by overwhelming margins of bipartisan support and which President Donald J. Trump signed into law effective December 20, 2018. In important part, the 2018 Farm Bill removes hemp from scheduled control under the federal Controlled Substances Act (21 U.S.C. § 801 *et seq.*) and prohibits states from interfering with the interstate shipment or transportation of hemp or hemp-derived products. Accordingly, the Roundtable remains actively committed to the preservation of these critical protections and also their accurate interpretation by local and state law enforcement and regulatory officials and local, state, and federal courts.

The subject matter of this litigation squarely implicates the mission of the Roundtable and threatens its federal and state advocacy efforts. If the Court were to determine that the 2018 Farm Bill does not protect hemp grown or cultivated prior to enactment of the 2018 Farm Bill, it would eschew clear congressional intent and cause unnecessary market uncertainty and trepidation in an industry on the cusp of economic boon.

The Roundtable understands that the business activities of the plaintiff in this case, Big Sky Scientific LLC (“Big Sky”), involve the manufacture and distribution of hemp-derived products. The Roundtable represents dozens of hemp product manufacturers, but its members do not include Big Sky. As such, Big Sky did not participate in the Roundtable’s successful advocacy of the 2018 Farm Bill, during which the Roundtable engaged federal lawmakers, including members of the conference committee, and came to understand congressional intent behind the legislation. Further, the Roundtable’s members do business outside Idaho; a legally unsound ruling by this Court might disturb or call into question their ongoing commercial activities in those jurisdictions. For those reasons, no party adequately represents the Roundtable’s direct interest in this litigation.

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**BRIEF IN SUPPORT OF BIG SKY SCIENTIFIC LLC’S EMERGENCY MOTION FOR
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Comes now U.S. Hemp Roundtable, Inc. (“Roundtable”), by and through counsel, and for its brief in support of the Emergency Motion for Temporary Restraining Order and Preliminary Injunction (“Emergency Motion”) of Plaintiff, Big Sky Scientific LLC (“Big Sky”), hereby states as follows:

INTRODUCTION

The Agriculture Improvement Act of 2018 (“2018 Farm Bill”) became effective on December 20, 2018. *See* Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat 4490, § 10113 (hereinafter “2018 Farm Bill”). In important part, it removes hemp and tetrahydrocannabinols (THCs) in hemp from scheduled controlled under the federal Controlled Substances Act (21 U.S.C. § 801 *et seq.*) (“CSA”). *Id.* § 12619(a)-(b). While some sections of the law have not yet been activated, the 2018 Farm Bill’s change in the federal legal status of hemp took immediate effect and applies to all hemp that meets the expanded federal definition of hemp, whether produced as part of future regulatory or tribal plans that the 2018 Farm Bill sanctions or as part of agricultural pilot programs previously established in forty-one states pursuant to the

Agriculture Act of 2014 (“2014 Farm Bill”). *See id.* § 10113 (establishing Subtitle G—Hemp Production and defining “hemp” in its Section 297A(1)). Similarly, the 2018 Farm Bill’s prohibition against states’ interference with hemp in interstate commerce protects all hemp that meets the expanded federal definition of hemp, not just hemp to be produced under the 2018 Farm Bill. To determine otherwise would defy clear congressional intent and common sense.

ARGUMENT

I. The federal definition of hemp depends only on plant species and THC concentration.

The products seized from Big Sky constitute federally-legal hemp under the 2018 Farm Bill, so long as they contain the plant *Cannabis sativa L.* (or parts of the plant) and have a THC concentration of 0.3% or less on dry weight basis. Their status as hemp does not depend on being produced under any particular law. The 2018 Farm Bill expands the federal definition of hemp as follows:

The term ‘hemp’ means the plant *Cannabis sativa L.* and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

See id. § 10113 (Subtitle G, Section 297A(1)). Nothing in this definition limits hemp to hemp produced under the 2018 Farm Bill or any other law. Indeed, apart from plant species (*Cannabis sativa L.*) and THC concentration on a dry-weight basis, the definition contains no limitations.

Prior to the 2018 Farm Bill, the 2014 Farm Bill defined 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 2014 Farm Bill permitted state departments of agriculture and institutions of higher education to conduct agricultural pilot programs for the growth or cultivation of hemp for research purposes. *See id.* § 5940(a)(1)-(2). As of December 20, 2018—the date on which the 2018 Farm Bill became

effective—some forty-one states had established agricultural pilot programs pursuant to the 2014 Farm Bill. *See* National Conference of State Legislatures, “State Industrial Hemp Statutes,” NCSL.ORG (Feb. 2, 2019), <http://www.ncsl.org/research/agriculture-and-rural-development/state-industrial-hemp-statutes.aspx>.

II. Section 10114’s reference to subtitle G of the Agricultural Marketing Act of 1946 refers to the expanded federal definition of hemp.

In its Memorandum Decision and Order, the Court suggested that Section 10114’s prohibition applies only to hemp or hemp products produced in accordance with subtitle G, a new subtitle which the 2018 Farm Bill establishes in the Agricultural Marketing Act of 1946. *See* Mem. Dec. and Ord., p. 11 (Dkt. 6). And, because the U.S. Department of Agriculture (USDA) has not approved any state’s regulatory plan submission, the Court intimated that the products seized from Big Sky “could not possibly” enjoy the protections of Section 10114. *Id.* Section 10114 merely reference subtitle G to refer to the expanded federal definition of hemp and does not limit its applicability to hemp produced under the 2018 Farm Bill.

In addition to expanding the federal definition of hemp, the 2018 Farm Bill prohibits states from interfering with the interstate transportation or shipment of hemp or hemp-derived products. Specifically, Section 12619 provides:

(a) **RULE OF CONSTRUCTION.**—Nothing in this title or an amendment made by this title prohibits the interstate commerce of hemp (as defined in section 297A of the Agricultural Marketing Act of 1946 (as added by section 10113)) or hemp products.

(b) **TRANSPORTATION OF HEMP AND HEMP PRODUCTS.**—No State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with subtitle G of the Agricultural Marketing Act of 1946 (as added by section 10113) through the State or the territory of the Indian Tribe, as applicable.

2018 Farm Bill, § 10114(a)-(b).

In unambiguous terms, Congress intended the 2018 Farm Bill to nullify any state activity that would impede the interstate movement of hemp or hemp-derived products. While states may choose to exercise primary regulatory authority over the production of hemp inside their borders through a regulatory plan approved by the USDA, they may not enforce against hemp in interstate commerce. *See id.* §§ 10113 (Subtitle G, Section 297B(a)(1), 12619(a)-(b)). Congress reiterated this intent in the conference report accompanying the 2018 Farm Bill: “While states and Indian tribes may limit the production and sale of hemp and hemp products within their borders, *the Managers, in Sec. 10112, agreed to not allow such states and Indian tribes to limit the transportation or shipment of hemp or hemp products through the state or Indian territory.*” 2018 Farm Bill Conference Report 115-1072, 738 (available at <https://www.congress.gov/115/crpt/hrpt1072/CRPT-115hrpt1072.pdf>) (emphasis added).¹

In limiting Section 10114 to only hemp produced under the 2018 Farm Bill, the Court effectively renders the section obsolete. Although some states have submitted regulatory plans for approval by USDA, no state has had its submission approved. Accordingly, domestic production of hemp under the 2018 Farm Bill has not begun. Under the Court’s reading, Section 10114 has no hemp to protect in interstate commerce. Obviously, this interpretation grossly contradicts Congress’ intent “to not allow such states and Indian tribes to limit the transportation or shipment of hemp or hemp products through the state or Indian territory,” without reference to any subtitle under which hemp may be produced. *See id.*

¹ The Managers’ note mistakenly refers to “Sec. 10112.” That section relates to a “Clarification of Use of Funds for Technical Assistance.” *See* 2018 Farm Bill, § 10112. Instead, Section 10113 of the 2018 Farm Bill provides the production and sale of hemp and hemp-derived products, and Section 10114 contains the prohibition against states’ interference with hemp in interstate commerce. *See generally id.* §§ 10113, 10114. As further evidence of Congress’ intent, the Roundtable attaches hereto as Exhibit A a letter from U.S. Congressman James Comer (KY-06), who introduced companion legislation that ultimately became part of the 2018 Farm Bill and served on the conference committee.

The interpretation also defies common sense. If Section 10114 protected only hemp produced under the 2018 Farm Bill (again, none of which exists), millions of tons of hemp legally produced under the 2014 Farm Bill would remain subject to state enforcement action. As mentioned, on the date the 2018 Farm Bill became law, some forty-one states had established agricultural pilot programs for the domestic growth or cultivation of hemp. *See* National Conference of State Legislatures, “State Industrial Hemp Statutes,” NCSL.ORG (Feb. 2, 2019), <http://www.ncsl.org/research/agriculture-and-rural-development/state-industrial-hemp-statutes.aspx>.

Moreover, by determining that Section 10144 operates in this way, the Court would have state law enforcement and regulatory officials keep track of which states have had their 2018 Farm Bill regulatory plan submissions approved by USDA—permitted to impede interstate commerce involving hemp or hemp-derived products originating from some states, but not from others. This would cause an absurd result and would undermine the explicit federal legality that the 2018 Farm Bill intends to achieve.

III. Idaho would violate the Commerce Clause of the United States Constitution if it restricts federally-legal hemp in interstate commerce.

If it continues to interfere with the interstate transportation or shipment of federally-legal hemp or hemp-derived products, Idaho risks running afoul of the Commerce Clause. Pursuant to its powers under Art. I, § 8, cl. 3 of the United States Constitution, Congress may regulate the channels of interstate commerce, instrumentalities of interstate commerce, and persons or things in interstate commerce, and activities that substantially affect interstate commerce. *See Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005). Legislation enacted to protect the interstate market for a fungible commodity falls within Congress’ powers to regulate things in interstate commerce, even if regulation targets “purely local activities” within Idaho. *See id.* at 17, 22 (holding that “Congress

was acting well within its authority [under the Commerce Clause]” when it enacted “comprehensive legislation to regulate the interstate market in a fungible commodity”); *see also Wickard v. Filburn*, 317 U.S. 111, 128 (1942) (“It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices.”).

Indeed, efforts by Idaho to control or restrict hemp or hemp-derived products moving within its borders but bound for other states substantially (and negatively) effects interstate commerce. *See Raich*, 545 U.S. at 17. Like the locally-cultivated marijuana at issue in *Raich*, there exists an “established . . . interstate market” for hemp and hemp-derived products. *See id.* at 19. And, just as the provisions of the CSA at issue in *Raich* were intended to “control the supply and demand of controlled substances in both lawful and unlawful drug markets,” so too are the provisions of the 2018 Farm Bill at issue in this case intended to control the supply and demand of a marketable commodity—though, in this case, to proliferate the supply and meet the market demand of hemp and hemp-derived products. *See id.* The 2018 Farm Bill ensures that hemp—an agricultural commodity—and hemp-derived products may move freely through interstate commerce. If Idaho impedes interstate commerce involving hemp or hemp-derived products, it will render the 2018 Farm Bill meaningless and invalidate Congress’ proper exercise of its Commerce Clause powers.

CONCLUSION

So long as they meet the expanded federal definition of hemp in the 2018 Farm Bill, the products seized from Big Sky constitute federally-legal hemp, even though they came into existence prior to enactment of that law. The 2018 Farm Bill does not distinguish between eras of hemp, and the full extent of its protections apply to all hemp that meets its definition. These protections include lawful authority to move through interstate commerce without interference by

states. In seizing Big Sky's products, Idaho has contravened the 2018 Farm Bill in excess of its authority. If the Court determines otherwise, it will subject millions of tons of federally-legal hemp to unauthorized enforcement and destabilize the interstate market for hemp and hemp-derived products. Further, Idaho's conduct, if continued, will undermine Congress' proper exercise of Commerce Clause powers.

Respectfully submitted,

/s/ Richard E. Plymale

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CERTIFICATE OF SERVICE

I hereby certify that I filed a true and accurate copy of the foregoing with the Clerk of Court via the Court's CM/ECF system on this 7th day of February, 2019, which will send a notice of electronic filing to all attorneys of record.

/s/ Richard E. Plymale

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February 6, 2019

Jonathan Miller, Esq.
General Counsel
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RE: Hemp Farming Act of 2018

Dear Jonathan:

I write to convey to the U.S. Hemp Roundtable my personal understanding of the legislative intent of the Hemp Farming Act of 2018.

As you know, in March 2018, Senator Mitch McConnell introduced S. 2667 legalizing hemp production nationally and making hemp an ordinary agriculture commodity. As the former Agriculture Commissioner of Kentucky and well-known advocate of hemp legislation, I introduced parallel legislation in the House of Representatives, H.R. 5485. The language within these bills was included in the Senate version of the 2018 Farm Bill. The Farm Bill was sent to a conference committee on which both Senator McConnell and I served. The resulting compromise version was then incorporated into the Agricultural Improvement Act of 2018, Pub. L. No. 115-334 (the "2018 Farm Bill") and enacted into law.

The legislation is intended to accomplish several important goals. First, it distinguishes industrialized hemp – defined as products having less than 0.3% THC – from marijuana. Second, it removes hemp from the Controlled Substances Act. Finally, the law categorizes hemp as a lawful agricultural commodity and provides for the free and unfettered interstate shipment of hemp and hemp products throughout the United States, including Indian territories.

Following enactment of the 2014 Farm Bill, which permitted state-regulated production of hemp, some forty-one states had authorized the production of hemp and numerous products made from hemp are already freely shipped in interstate commerce through the U.S. Postal Service, UPS, FedEx, and other delivery mechanisms. The 2018 Farm Bill was intended to expand on this development and provide for the free transportation of hemp in interstate commerce. While the law does not interfere with the rights of individual states to regulate the production and use of hemp or its products, it is intended to allow the shipment of hemp, as an agricultural commodity, through any state, thereby allowing it to reach a destination where it can be used to lawfully produce products in accordance with the regulations of the recipient state.

Thus, the statute was designed and intended to allow free and immediate interstate shipment of hemp as an agricultural commodity, leaving to the states, as provided in the 2014

Farm Bill, to continue to regulate the growth and use of hemp within the state, but not to control or regulate the interstate shipment of hemp.

I believe that these views are consistent with the intent of Congress as expressed in the 2018 Farm Bill. It is my belief that this new law will to once again allow the United States to become of the world's leading producers of hemp and hemp products.

Sincerely,

A handwritten signature in blue ink that reads "James Comer". The signature is written in a cursive, flowing style.

James Comer,
Member of Congress