CHEECH AND CHONG GO TO COURT: LEGAL CHALLENGES TO CALIFORNIA'S PROHIBITION OF HEMP IN FOOD PRODUCTS

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The status of federal law on marijuana has remained stagnant for decades despite frequent calls to decriminalize it, reschedule it, and release those individuals that have been imprisoned for use and sale of it. In the persistent absence of federal action to change the status quo, states have begun to move into the regulatory space. Several states have provided legal mechanisms to sell and distribute marijuana, establish dispensary businesses, and tax it as a mainstream product. Cannabis and marijuana are both terms that refer to the Cannabis sativa plant.[1] Cannabis, as a scientific term, refers to a broad family of plants; only some of that plant family produce tetrahydrocannabinol, or THC, a chemical with well-documented psychoactive effects. The term marijuana typically refers to the substances and products that contain THC. Products containing cannabis span a vast array of applications, from medicinal to recreational, including the increasing use of THC-containing ingredients in food, beverages, and dietary supplements.

This article explores the realm of hemp regulation as it relates to the broader landscape of marijuana and cannabis law and policy, looking to the state of California as a model for increased oversight of hemp-containing products that pose a danger to public health. Section I describes the three key federal agencies involved in cannabis law and the recent actions to reschedule and to develop a feasible path to regulation. Section II defines the scope of industrial hemp under federal legislation and presents several loopholes created by that legislation. Section III explores California's recent emergency action involving intoxicating hemp and related litigation challenging the state's authority. Section IV addresses general trends in state and global regulation of intoxicating hemp products.

I. FEDERAL SCRUTINY OF CANNABIS AND CANNABIS-DERIVED PRODUCTS: THE DOJ, THE DEA, AND THE FDA

Recently, in May 2024, the Department of Justice (DOJ) through the Drug Enforcement Administration (DEA) put forth proposed regulations to reschedule marijuana from Schedule I to Schedule III under the authority in the Controlled Substances Act (CSA).[2] Schedule I under the CSA means that the

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1. This article will use both the terms marijuana and cannabis.

2. DRUG ENFORCEMENT ADMINISTRATION, Rule, Schedules of Controlled Substances: Rescheduling of Marijuana, 89 Fed. Reg. 44597 (proposed May 21, 2024), *available at* https://www.regulations.gov/document/DEA-2024-0059-0001 [https://perma.cc/DGX6-PF74]; Office of Public Affairs, *Justice Department Submits Proposed Regulation to Reschedule Marijuana*, DEPARTMENT OF JUSTICE (May 16, 2024), https://www.justice.gov/archives/opa/pr/justice-department-submits-proposed-regulation-reschedule-marijuana [https://perma.cc/7PRR-H9LE].

use, sale, or distribution of marijuana is illegal under federal law as it has a high potential for abuse, no currently accepted medical use in treatment in the U.S., and there is no accepted safety for use under medical supervision.[3] Schedule III substances are those with a potential for abuse that is less than for those in Schedules I and II, has a currently accepted medical use in the U.S., and abuse may lead to moderate or low physical dependence or high psychological dependence.[4] The DEA, an agency within the DOJ, is responsible for enforcement of the CSA.

The notice of proposed rulemaking follows a directive from President Biden in October 2022, asking the Attorney General and Secretary of Health and Human Services (HHS) to review the scientific evidence underpinning the scheduling of marijuana under federal law.[5] Coupled with this directive, President Biden also issued a pardon of prior federal offenses of the simple possession of marijuana and instructed the Attorney General to implement a process for issuance of certificates of pardon.[6] Biden urged governors to follow his lead in their states.[7] After receiving feedback from HHS and consultation with the Office of Legal Counsel, the Department of Justice initiated its rulemaking authority to notify the public of the intent to reschedule marijuana.[8] The process requires the DOJ to proceed utilizing formal rulemaking proceedings, which are to be on the record after the opportunity for a hearing and adhere to the requirements of the Administrative Procedure Act §§ 556 and 557.[9] Formal rulemaking is more time-consuming than notice and comment rulemaking, resembling adjudicatory proceedings, making the task an onerous one that may take years to complete. The Justice Department has received about 43,000 public comments on the docket,[10] and the preliminary hearing was held on December 2, 2024.[11] The subsequent hearings scheduled for late January,[12] however, have been postponed until further notice.[13]

Recently, the rulemaking process has been challenged in Washington

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3. 21 U.S.C. § 812(b)(1)(A)-(C).

4. 21 U.S.C. § 812(b)(3)(A)-(C).

5. THE WHITE HOUSE, *Statement from President Biden on Marijuana Reform* (Oct. 6, 2022) https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/ [https://perma.cc/FT6M-8DJN].

6. *Id.*

7. *Id.*

8. DRUG ENFORCEMENT ADMINISTRATION, 89 Fed. Reg. 44597 (proposed May 21, 2024).

9. *Id.*

10. *Id.*

11. DRUG ENFORCEMENT ADMINISTRATION, *Notice of Hearing on Proposed Rulemaking*, 89 Fed. Reg. 70148 (proposed Aug. 29, 2024) *available* at https://www.regulations.gov/document/DEA-2024-0059-42928 [https://perma.cc/K6ZP-4JC4].

12. Sam Reisman, *DEA Judge Sets Pot Rescheduling Hearings*, LAW360 (Dec. 4, 2024), https://www.law360.com/articles/2269288/dea-judge-sets-pot-rescheduling-hearings [https://perma.cc/2727-TLQF].

13. Joseph Choi, *Marijuana Rescheduling Runs Into Roadblock*, THE HILL (Jan. 18, 2025), https://thehill.com/policy/healthcare/5092684-dea-hearing-appeal-marijuana-rescheduling/ [https://perma.cc/U8UJ-ZE3E].

federal court under the Administrative Procedure Act by a psychedelic researcher.[14] The researcher, who is also the CEO of Panacea Plant Sciences, argues that the DEA unlawfully excluded some stakeholders from the public hearing process required in the formal rulemaking provisions, particularly representatives of tribal governments and small businesses.[15] Regulations promulgated by the DEA require that interested parties participating in rescheduling hearings must be "adversely affected or aggrieved" by the proposed rule.[16] The DEA had provided a list of twenty-five individuals to the chief administrative law judge overseeing the proceedings.[17] In an October 2024 preliminary order, the judge directed the DEA's designated participants to explain how they met the regulatory criteria to qualify them to take part in the hearing, whether they were in support of the rescheduling or in opposition, and whether they had any conflicts of interest relating to leadership or personnel of the DOJ or DEA.[18]

The DEA administrative law judge also subsequently denied the petition of a group of veterans represented by the Veterans Action Council (VAC) to participate in the hearings.[19] The VAC argued that the DEA should instead reschedule cannabis to Schedule 5, which "will allow the VA doctor to prescribe the medication and for the Veteran Affairs Administration to pay for the product that the Veteran would then go purchase themselves."[20] Schedule 5 is the least restrictive scheduling for drugs with the lowest potential for abuse and a currently accepted medical treatment consisting of preparations that contain limited quantities of particular narcotics.[21] The DEA considers Schedule 5 drugs to be those used generally for, among other things, analgesic purposes.[22]

Historically, the Food and Drug Administration (FDA) has not regulated products containing cannabis, tetrahydrocannabinol (THC), cannabidiols, or cannabinoids under existing statutory authority. The FDA's relevant legal authority encompasses food, including food additives and dietary supplements. The Food, Drug, and Cosmetic Act (FDCA) defines food simply as "(1) articles used for food or drink for man or other animals, (2) chewing gum, and (3)

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14. Sam Reisman, *Researcher Sues DEA Over Pot Rescheduling Process*, LAW360 (Nov. 7, 2024), https://www.law360.com/articles/2258255/researcher-sues-dea-over-pot-rescheduling-process [https://perma.cc/KG6F-4PLC]; *David Heldreth v. Merrick Garland et al.*, case no. 2:24-cv-01817, U.S. District Court, Western District of Washington.

15. Reisman, *Researcher Sues DEA*, *supra* note 14.

16. *Id.*

17. *Id.*

18. *Id.*

19. U.S. DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT AGENCY, *Order Regarding Request from a Non-Participant (Veterans Action Counsil) in the Matter of Schedules of Controlled Substances: Proposed Rescheduling of Marijuana*, DEA Docket No. 1362, Hearing Docket No. 24-44 (Nov. 15, 2024).

20. VETERANS ACTION COUNCIL (VAC), Notice of Request to Present at Hearing, at 1 (Sept. 25, 2024).

21. 21 U.S.C. § 812(b)(5)(A)-(C).

22. DRUG ENFORCEMENT ADMINISTRATION, *Drug Scheduling*, (July 10, 2018), https://www.dea.gov/drug-information/drug-scheduling [https://perma.cc/9383-45DE].

articles used for components of any such article."[23] Food products are generally not subject to premarket approval unless they contain a food additive or color additive that is not listed as safe for use in food. The two basic provisions that apply to food products once they enter the market are adulteration and misbranding, addressing manufacturing and quality, and labeling and product claims, respectively. Food additives are defined as:

> any substance the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food (including any substance intended for use in producing, manufacturing, packing, processing, preparing, treating, packaging, transporting, or holding food; and including any source of radiation intended for any such use), if such substance is not generally recognized, among experts qualified by scientific training and experience to evaluate its safety, as having been adequately shown through scientific procedures (or, in the case of a substance used in food prior to January 1, 1958, through either scientific procedures or experience based on common use in food) to be safe under the conditions of its intended use[.][24]

The definition excludes pesticide chemical residues, pesticides, color additives, substances with prior sanction, a new animal drugs, and ingredients used in dietary supplements.[25] The FDA has developed Generally Recognized as Safe (GRAS) listings that identify those food additives that have been deemed to be generally recognized as safe.[26] Products conforming to these GRAS listings, which may include constraints on type of food products, chemical structures, other allowable ingredients, and threshold levels within the food, may enter the market without premarket approval. Food additives can be either direct additives, or indirect (such as food contact substances like food packaging). The FDA has not considered hemp containing THC as a food additive under its GRAS regime.

Dietary supplements are another subset of food, though legislation carves out specific provisions for supplement labeling, product disclaimers, and use of health and disease-related claims. The definition provides that dietary supplements are:

> intended to supplement the diet that bears or contains one or more of the following dietary ingredients: (A) a vitamin; (B) a mineral; (C) an herb or other botanical; (D) an amino acid; (E) a dietary substance for use by man to supplement the diet by increasing the total dietary intake; or (F) a concentrate, metabolite, constituent, extract, or combination of

23. 21 U.S.C. § 321(f); Food, Drug and Cosmetic Act (FDCA) § 201(f).
24. 21 U.S.C. § 321(s); FDCA §201(s).
25. 21 U.S.C. § 321(s)(1)-(6); FDCA §201(s)(1)-(6).
26. 21 C.F.R. § §170-189.

> any ingredient described in clause (A), (B), (C), (D), or (E); (2) means a product that— (A)(i) is intended for ingestion in a form described in section 350(c)(1)(B)(i) of this title; or (ii) complies with section 350(c)(1)(B)(ii) of this title; (B) is not represented for use as a conventional food or as a sole item of a meal or the diet; and (C) is labeled as a dietary supplement.[27]

The FDA maintains that aside from hemp seed ingredients not containing THC (though derived from THC), no other cannabis-derived ingredients have been the focus of a petition for GRAS listing or otherwise approved for use in food.[28]

The FDA does, however, contemplate the regulation of medicinal products containing THC as drugs. These medicinal products are subject to stringent premarket approval requirements to establish safety and efficacy and are limited to a specific intended use.[29] The legislation defines a drug as:

> [A]rticles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (D) articles intended for use as a component of any article[.][30]

The FDA has not approved any drug containing cannabis, though has approved one cannabis-derived prescription drug and three "cannabis-related" prescription drug products.[31] Epidiolex is approved for the treatment of Lennox-Gastaut syndrome and Dravet syndrome seizures in patients one year and older and treatment of tuberous sclerosis complex symptoms in patients one year and older.[32] The active ingredient in Epidiolex is a purified form of CBD.[33] Both Marinol and Syndros have been approved for the treatment of anorexia associated with AIDS-related weight loss.[34] The two drugs contain dronabinol, a synthetic delta-9-tetrahydrocannabinol (THC).[35] A fourth FDA-approved drug, Cesamet, contains synthetically derived nabilone, which has a similar chemical structure to THC.[36] Cesamet is approved for the treatment of nausea

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27. 21 U.S.C. § 321(ff); FDCA §201(ff).

28. U.S. FOOD & DRUG ADMIN., *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)*, https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd#farmbill [https://perma.cc/3Z8F-CKXZ] (last updated July 16, 2024).

29. 21 U.S.C. § 355(b)(1); FDCA §505(b)(1).

30. 21 U.S.C. § 321(g)(1)(B)-(D); FDCA §201(g)(1)(B)-(D). The definition also includes products listed in the U.S. Pharmacopeia/National Formulary (USP/NF). 21 U.S.C. §321(g)(1)(A); FDCA §201(g)(1)(A)).

31. U.S. FOOD & DRUG ADMIN., *FDA Regulation of Cannabis*, *supra* note 28.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

and vomiting in patients undergoing cancer chemotherapy who have not responded to conventional antiemetic treatments.[37]

In January 2023, the FDA responded to citizen petitions requesting that the agency issue regulations to allow the marketing of dietary supplements containing CBD.[38] The response indicates that given available scientific evidence, the FDA does not intend to issue such a rulemaking.[39] The reasoning focuses on the fact that such products would not meet the applicable safety standards dictated by the statute and regulations. The agency issued a further statement setting forth its conclusion that the current regulatory frameworks are not appropriate for food and dietary supplements containing CBD.[40] The agency noted the need to partner with Congress to address these types of products, urging the need for a new pathway that utilizes a harm reduction approach.[41] In the enforcement context, the FDA has issued a number of Warning Letters to industry, targeted to products making medicinal claims, human and animal foods containing added CBD, products with routes of administration of concern (*e.g*., nasal, ophthalmic, and inhalation), and delta-8 THC products specifically. The FDA has also published public announcements warning of the dangers of accidental ingestion of food products that contain THC by children.[42] Peer-reviewed studies conducting assessments of children's exposure indicate a consistent rise in exposure of pediatric populations under six years of age, including exposure involving significant toxicity from edible ingestion.[43]

II. SO, WHAT IS "HEMP"?

Congress passed the Agriculture Improvement Act (also known as the Farm Bill) in 2018, defining industrial hemp as "Cannabis sativa L. . . . with a delta-9 tetrahydrocannabinol concentration not more than 0.3 percent on a dry weight

37. Cesamet (nabilone) New Drug Approval, NDA 18-677/S-011, at 3 (2006), *available at* https://www.accessdata.fda.gov/drugsatfda_docs/label/2006/018677s011lbl.pdf [https://perma.cc/RX7H-52X6].

38. U.S. FOOD & DRUG ADMIN., *Constituent Update, FDA Issues Response to Three Citizen Petitions Related to CBD and Dietary Supplements*, (Jan. 26, 2023), https://www.fda.gov/food/hfp-constituent-updates/fda-issues-response-three-citizen-petitions-related-cbd-and-dietary-supplements [https://perma.cc/A8K3-52L4].

39. *Id.*

40. U.S. FOOD & DRUG ADMIN., *FDA Concludes that Existing Regulatory Frameworks for Food and Supplements are Not Appropriate for Cannabadiol, Will Work with Congress on a New Way Forward*, (Jan. 26, 2024), https://www.fda.gov/news-events/press-announcements/fda-concludes-existing-regulatory-frameworks-foods-and-supplements-are-not-appropriate-cannabidiol [https://perma.cc/DVK9-GC7B].

41. *Id.*

42. U.S. FOOD & DRUG ADMIN., *FDA Warns Consumers About the Accidental Ingestion by Children of Food Products Containing THC*, (June 22, 2022), https://www.fda.gov/food/alerts-advisories-safety-information/fda-warns-consumers-about-accidental-ingestion-children-food-products-containing-thc [https://perma.cc/CY59-NEAC].

43. *See, e.g*., Marit S. Tweet, Antonia Nemanich, & Michael Wahl, *Pediatric Edible Cannabis Exposures and Acute Toxicity: 2017-2021*, 151 PEDIATRICS e2022057761 (2023).

basis," including hemp derivatives (*e.g.*, cannabidiol, CBD).[44] The Farm Bill was enacted as part of the 2018 omnibus appropriations bill dealing with food and agriculture and was recently extended for an additional year through September 30, 2025.[45] The legislation removed hemp from regulation by the DEA under Schedule I of the CSA.[46] However, hemp is still subject to regulation by the FDA under the Food, Drug, and Cosmetic Act.[47] The National Academies of Sciences, Engineering and Medicine released an extensive report in September 2024 with recommendations for federal policymakers on ways to uniformly address and implement health standards for federal marijuana regulation.[48] The study scrutinized existing law and policy and specifically assessed the variations in state laws that have legalized cannabis, as well as policy surrounding intoxicating hemp products.[49] The study identified a problematic loophole in the Farm Bill of 2018 that effectively legalized industrial hemp yet allowed synthetic versions of synthetic cannabinoids derived from hemp that had psychoactive effects.[50] Additionally, while there is a 0.3 percent concentration limit in the Farm Bill for industrial hemp,[51] there is no weight limit (*i.e.*, milligram limit) for agricultural hemp products.

As discussed above, food products, including beverages and dietary supplements, containing hemp are currently present in the market in a variety of forms and are subject to oversight by the FDA under exiting authority over food and food additives. Given the language of the Farm Bill, which gives a concentration limit but no weight limit and does not apply to synthetic products, companies are shifting focus to using hemp derivatives like cannabidiol as food ingredients and additives. They are also engaging in targeted marketing campaigns directed to youth and CBD users and often developing packaging that appears like typical grocery products. The FDA makes warning letters to allegedly violative products containing CBD and other cannabis-derived products publicly available on its website.[52] Most of the letters address drug or biologic products rather than hemp, though several address adulteration issues within facilities manufacturing hemp food products or problems with inaccurate

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44. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 stat. 4908 (2018) (also known as the Farm Bill), codified at 7 U.S.C. §1621 et seq.

45. American Relief Act of 2024, Pub. L. No. 118-158, 138 stat. 1723 (2024).

46. Pub. L. No. 115-334, 132 stat. 4908, at §12619(b).

47. 21 U.S.C. §201; FDCA §101.

48. NAT'L ACAD. OF SCI., ENG'G & MED., *To Protect Public Health, Federal Government Should Provide Guidance to States that Have Legalized Marijuana, Close Hemp Regulatory Loopholes, Create Public Health Campaign*, (Sept. 26, 2024), https://www.nationalacademies.org/news/2024/09/to-protect-public-health-federal-government-should-provide-guidance-to-states-that-have-legalized-marijuana-close-hemp-regulatory-loopholes-create-public-health-campaign [https://perma.cc/Y2R3-DEBU]; NAT'L ACAD. OF SCI., ENG'G & MED., CANNABIS POLICY IMPACTS PUBLIC HEALTH AND HEALTH EQUITY (Nat'l Acads. Press, 2024).

49. *Id.*

50. NAT'L ACAD. OF SCI., ENG'G & MED., *To Protect Public Health*, *supra* note 48.

51. *Id.*

52. U.S. FOOD & DRUG ADMIN., *Warning Letters for Cannabis-Derived Products*, https://www.fda.gov/news-events/public-health-focus/warning-letters-cannabis-derived-products [https://perma.cc/NH4R-HWZD] (last updated Nov. 20, 2024).

labeling of ingredients.[53]

Language in the most recently proposed Farm Bill would address the increasing marketing of synthetic products by excluding from the definition of hemp any "hemp-derived products containing cannabinoids not naturally produced in the cannabis plant or that are naturally produced but were synthesized or manufactured outside of the plant" or "quantifiable amounts of any THC or any cannabinoids that have or are marketed to have similar effects as THC."[54] This language would effectively remove delta-8 products and other intoxicating synthetic cannabinoids that are becoming commonplace in smoke shops and other outlets. However, as of the end of last session, Congress has passed another one-year extension of the existing provisions in the 2018 Farm Bill.

III. CALIFORNIA'S REGULATORY ACTION AND RESULTING LITIGATION

California's action to regulate hemp in food products comes in the wake of the years of inaction by the FDA to clarify regulation of hemp and CBD in foods. While the FDA has pledged to partner with Congress to explore the need for development of statutory and regulatory regimes specific to CBD and hemp, there remains no consistent or predictable oversight. On September 13, 2024, Governor Newsom announced that California's Department of Public Health introduced a *Notice of Proposed Emergency Regulatory Action Serving Size, Age, and Intoxicating Cannabinoids for Industrial Hemp*.[55] The notice was issued under the authority of the California Health and Safety Code. Section 11065 of the Code provides that the "department may adopt any regulations that it determines are necessary"[56] and "may adopt emergency regulations to implement" those regulations.[57] The Code continues by providing that "[i]nitial regulations regarding industrial hemp shall be exempt from the Administrative Procedure Act"[58] except that "the department shall post the proposed regulations on its internet website for public comment for 30 days."[59]

The *Notice of Emergency Regulatory Action* contains three core features. The first is prohibitory language indicating "[a] person shall not manufacture, warehouse, distribute, offer, advertise, market, or sell industrial hemp final food products intended for human consumption including food, food additives,

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53. *Id.*

54. *Farm, Food and National Security Act of 2024*, H.R. 8567, 118th Cong. (2024); McGlinchey Stafford, *Major Changes Could be in Store for Hemp in 2025*, JD SUPRA (Nov. 6, 2024), https://www.jdsupra.com/legalnews/major-changes-could-be-in-store-for-4508582/ [https://perma.cc/J6GX-6ET6].

55. CAL. DEP'T OF PUB. HEALTH, Finding of Emergency, Regulations for Serving Size, Age, and Intoxicating Cannabinoids for Industrial Hemp, DPH-24-005E (Sept. 13. 2024), https://www.cdph.ca.gov/Programs/OLS/CDPH%20Document%20Library/DPH-24-005E-FindingsText.pdf [https://perma.cc/Q4J3-2UF6].

56. CAL. HEALTH & SAFETY CODE § 110065(a).

57. CAL. HEALTH & SAFETY CODE § 110065(a) & (b)(1).

58. CAL. HEALTH & SAFETY CODE § 110065(c).

59. *Id.*

beverages, and dietary supplements that are above the limit of detection for total THC per serving."[60] As the Department of Public Health explains, this bans any detectable THC or intoxicating cannabinoids per serving from final food products derived from hemp.[61] The second feature is an age restriction of 21 years old for the offer or sale of such products. The third is a provision limiting serving and package sizes.[62] The effective date for the emergency regulatory action was September 23, 2024.[63] The notice included reference to the intoxicating effects of hemp cannabinoids, the negative impact on cognitive functioning, and "significant reports of hospitalizations among teenagers and young adults."[64] The notice also stated that current California state law is stricter than the Farm Bill because it limits delta-8 THC, delta-9 THC, and "any intoxicating cannabinoid as defined by the department to 0.3% or less."[65] The law also states that industrial hemp "cannot be synthetically derived or contain any THC isolates."[66] The Department's Office of Communication notes that the regulations do not ban hemp-derived CBD products that do not contain detectable levels of THC or intoxicating cannabinoids, nor does it ban cannabis products.[67]

Shortly after Governor Newsom's announcement of the notice of emergency regulatory action, representatives for industry sued, challenging the action under both federal and state law, and alleging violations of procedural due process.[68] The primary trade organizations for the hemp industry, U.S. Hemp Roundtable, Inc., along with Cheech and Chong Global Holdings, Inc., alleged that the action violated California's administrative procedures and federal and state laws, including the Farm Bill and California's own laws.[69] Plaintiffs moved for a temporary restraining order, arguing they would suffer lost revenue if the ban were to be enforced.[70] On October 11, 2024, Judge Goorvitch in the Superior Court of California, Los Angeles County, denied the request for a temporary restraining order, finding a lack of showing of irreparable harm to their business operations, noting that the state's interest in the protection of consumers outweighed the parties' interests in selling hemp products.[71]

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60. CAL. DEP'T OF PUB. HEALTH, Finding of Emergency, *supra* note 55.

61. CAL. DEP'T OF PUB. HEALTH, *California's Ban on Intoxicating Hemp Products Now in Effect*, (Sept. 24, 2024), at https://www.cdph.ca.gov/Programs/OPA/Pages/NR24-26.aspx [https://perma.cc/VA2P-QPFT].

62. CAL. DEP'T OF PUB. HEALTH, Finding of Emergency, *supra* note 55.

63. *Id.*

64. *Id.*

65. *Id.*; CAL. GOVERNMENT CODE § 11018.5.

66. CAL. DEP'T OF PUB. HEALTH, Finding of Emergency, *supra* note 55.

67. CAL. DEP'T OF PUB. HEALTH, *California's Ban*, *supra* note 61.

68. U.S. Hemp Roundtable, Inc., et al., v. California Department of Public Health, et al., Order Denying Ex Parte Application for TRO, Case No. 24STCPO3095 (Cal. Super. Ct. Oct. 10, 2024).

69. *Id.*

70. *Id.*

71. *Id.*

In his order denying the temporary restraining order, Judge Goorvitch also interpreted the California law. He concluded that the language exempting industrial hemp from the Administrative Procedure Act does not apply to regulations adopted pursuant to other sections of the Health and Safety Code expressly cited.[72] Those sections cited authorize the Department of Health and Safety to adopt regulations pertaining to "active cannabinoid concentration per serving size"[73] and "imposing an age requirement for the sale of certain industrial hemp products upon a finding of a threat to public health.[74] Judge Goorvitch determined that the state administrative procedure act further provides that for emergency regulations adopted by the Department of Health, any finding of emergency must be presented in written form and contain specific facts demonstrating the existence of that emergency and the need for immediate action.[75] The department must also "demonstrate, by substantial evidence, the need for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency."[76] Judge Goorvitch concluded that the state seemed to have complied with all of the requirements, leaving a genuine question as to whether the petitioners would prevail on the merits.[77]

California has begun enforcement activities under the new regulations. A February 2024 study authored by the Pew Research Center reports that over one thousand illegal cannabis stores operate in Los Angeles County alone, many of which carry the newly prohibited food and beverage items.[78] The state's Department of Alcoholic Beverage Control, along with the Department of Cannabis Control, has announced that they "will enforce all California laws and regulations" through the work of "cannabis and tobacco inspectors."[79]

III. STATE AND INTERNATIONAL ACTIVITIES TO BAN OR RESTRICT INTOXICATING HEMP PRODUCTS

In addition to California, at least ten other states have adopted laws somehow restricting sales or access to products containing hemp-derived cannabinoids, though California's is regarded as one of the most restrictive of

72. *Id.*

73. CAL. HEALTH AND SAFETY CODE § 111922.

74. CAL. HEALTH AND SAFETY CODE § 111921.3.

75. CAL. GOVERNMENT CODE § 11346.1(b)(2).

76. *Id.*

77. U.S. Hemp Roundtable, Inc., et al., v. California Department of Public Health, et al., Order Denying Ex Parte Application for TRO, Case No. 24STCPO3095, at 7 (Cal. Super. Ct. Oct. 10, 2024).

78. Connor Sheets, *Why Did California "Kill" Its Booming Heal-derived THC Industry*?, LA TIMES (Nov. 25, 2024), https://www.latimes.com/california/story/2024-11-25/california-thc-ban-hemp-industry-fallout [https://perma.cc/2AYJ-3DEQ].

79. Governor Gavin Newsom, *Governor Newsome Issues Regulations To Protect Kids From Dangerous and Intoxicating Hemp Products*, (Sept. 6, 2024), https://www.gov.ca.gov/2024/09/06/governor-newsom-issues-regulations-to-protect-kids-from-dangerous-and-intoxicating-hemp-products/ [https://perma.cc/TE2L-J2GH].

the state laws. [80] A comparative analysis of these laws is outside the scope of this article, though there are useful practitioner materials that summarize the legislation.[81] Other states with current relevant laws in effect are Connecticut, Florida, Georgia, Iowa, Kentucky, Oregon, South Dakota, Tennessee, Utah, West Virginia, and Wyoming.[82] Governor Mike Parson of Missouri also signed an Executive Order to remove all hemp-derived THC beverages and edibles on August 1, 2024, which was subsequently challenged in court.[83] The outcome of the order's legality is pending, and the state has not been enforcing the prohibitions.[84] Three additional states (Illinois, Louisiana, and Ohio) have also proposed legislation that would impose various elements of THC limits, age restrictions, label requirements, and marketing restrictions.[85]

International frameworks regarding regulation also vary. On the issue of hemp and hemp-derived cannabinoids in food products, some regions and countries have enacted specific regulations and guidance for legally allowable conditions for marketing and sale, while others have highly restricted use in beverages and food.[86] For example, although hemp has been long recognized for medicinal effects in China, it is unclear how hemp-derived food products containing CBD will be characterized by authorities.[87] Likewise, efforts in Europe by the European Commission to determine whether CBD in food is within the scope of the United Nations Convention have proven challenging, and products not falling within the scope of the convention are subject to the European Union's novel food regulation scheme that requires premarket approval.[88] This regulatory scheme is similar to the GRAS listing process implemented by the FDA. One example of supporting regulatory action is that of Thailand, a country that has affirmatively allowed CBD from hemp seeds in

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80. *See* Andrea Golan, *Newly Enacted Hemp Laws in 2024: Key Regulatory Updates Across the US*, VINCENTE LLP INSIGHTS (May 28, 2024), https://vicentellp.com/insights/newly-enacted-hemp-laws-in-2024-key-regulatory-updates-across-the-us/ [https://perma.cc/2LGT-SZ29perma].

81. *Id.*

82. *Id.*

83. *See* Rebecca Rivas, *Missouri Hemp Leaders File Suit to Halt Governor's Ban on Hemp THC Products*, MISSOURI INDEPENDENT (Aug. 20, 2024), https://missouriindependent.com/2024/08/30/missouri-hemp-leaders-set-to-file-suit-to-halt-governors-ban-on-hemp-thc-products/ [https://perma.cc/VR56-4UUZ]; Stephen L. Bartlett, *Showdown in the Show Me State: New Hemp Executive Order Sparks Litigation and Subsequent Clarification from MO DHSS*, FOLEY HOAG (Sept. 18, 2024), https://foleyhoag.com/news-and-insights/blogs/cannabis-and-the-law/2024/september/showdown-in-the-show-me-state-new-hemp-executive-order-sparks-litigation-and-subsequent-clarificat/ [https://perma.cc/ZNK8-E8E6].

84. Rebecca Rivas, *"Hemp Sales are Back On": Missouri Regulators Pare Down Ban on Intoxicating Hemp Products*, MISSOURI INDEPENDENT (Sept. 18, 2024), https://missouriindependent.com/2024/09/18/hemp-sales-are-back-on-missouri-regulators-pare-down-ban-on-intoxicating-hemp-products/ [https://perma.cc/8VSE-KM2F].

85. Golan, *supra* note 80.

86. David Pineda Eneño, *Global Regulatory Trends in CBD Use in Food and Food Supplements*, REGULATORY FOCUS (Jun. 2021), https://rapsprod.blob.core.windows.net/rapsk13/raps/media/news-images/feature%20pdf%20files/21-6_pineda.pdf [https://perma.cc/E9XL-B8T4].

87. *Id.*

88. *Id.*

food, including express conditions of use and limits on CBD and THC levels.[89]

CONCLUSION

State, federal, and global efforts to develop hemp regulation for food products are in the early stages, with the loopholes in legislation and innovations in synthetic derivatives causing increasing concern about public health. California's approach offers insights on how states may utilize their own administrative law and public health laws to effectuate change in the absence of federal policy.

89. *Id.*