UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
NO. 07-3837

David Monson; Wayne Hauge,	)
	)
Plaintiffs-Appellants	)
	)
v.	)
	)
Drug Enforcement Administration;	)
Department of Justice,	)
	)
Defendants-Appellees	)

Appeal from the United States District Court for the
District of North Dakota in Civil Case No. 4:07-cr-042
Judge Daniel L. Hovland

BRIEF AND ADDENDUM OF APPELLANTS DAVID MONSON AND WAYNE HAUGE

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SUMMARY OF THE CASE

Two North Dakota farmers sought declaratory relief that their planned cultivation of industrial hemp under licenses issued pursuant to state law would not violate the Controlled Substances Act ("CSA"). State law ensures industrial hemp plants have no potential drug use and limits the parts of the plant that may enter the stream of commerce to those expressly exempted from regulation by the CSA, namely, hemp stalk, fiber, seed and oil.

The Drug Enforcement Administration filed a Rule 12(b)(6) motion to dismiss. The District Court granted the motion, but erroneously declined to accept as true the factual allegations of the Complaint in concluding that because industrial hemp at some point contains psychoactive levels of THC, it is a controlled substance and fungible with drug marijuana. The Court also erroneously rejected the Appellant's Commerce Clause challenge to the Controlled Substances Act as applied to them.

Appellants respectfully request oral argument, with thirty minutes per side allowed. This case raises significant questions about pre-emption of a North Dakota law enacted to expand opportunities for the state's farmers. This case also differs significantly from this Court's earlier decision in

United States v. White Plume, 447 F.3d 1067 (8th Cir. 2006).

JURISDICTIONAL STATEMENT

The District Court had jurisdiction of this action pursuant to the Administrative Procedure Act, 5 U.S.C. §§701 *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. §2201. In the District Court, plaintiffs were not seeking review of any "final decision" of Defendant-Appellee Drug Enforcement Administration ("DEA"). Therefore, the provision of the Controlled Substances Act conferring exclusive jurisdiction over review of such a "final decision" in the Courts of Appeals, 21 U.S.C. § 877, was inapplicable, and the District Court so found. (Appendix ("AA.") 39).

The District Court granted DEA's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on November 28, 2007. The District Court's order granting that motion was a final order disposing of all of the claims of Plaintiff-Appellants David Monson and Wayne Hague. (AA. 32-53). Rep. Monson and Mr. Hague timely filed their Notice of Appeal on December 14, 2007. (AA. 55). Jurisdiction is proper in this Court under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the District Court err in failing to accept as true the factual allegations of the Complaint for purposes of ruling on a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6)?

   Most apposite cases and statutory provisions:

   Fed. R. Civ. P. 12(b)(6);
   Schmedding v. Tnemec Co., Inc., 187 F.3d 862 (8th Cir. 1999);
   Country Club Estates, LLC v. Town of Loma Linda, 213 F.3d 1001 (8th Cir. 2000).

2. Did the District Court err in concluding industrial hemp can produce a drug effect, there is no way to distinguish in-state industrial hemp from marijuana for drug enforcement purposes and that hemp is therefore fungible with drug marijuana such that Congress can constitutionally regulate the intrastate cultivation of industrial hemp within North Dakota under its Commerce Clause authority, even though North Dakota law ensures that that the state-regulated in-state industrial hemp has such minimal trace THC as to be useless as a drug and that the only parts of the plant that enter commerce are those specifically exempted from federal regulation?

Most apposite cases and constitutional/statutory provisions:

U.S. Const. Art. I, § 8 (Commerce Clause);
Gonzalez v. Raich, 545 U.S. 1 (2005).

STATEMENT OF THE CASE

On June 18, 2007, the appellants State Representative David Monson and Wayne Hague, two North Dakota farmers ("the farmers"), filed a Complaint seeking a declaratory judgment that their planned cultivation of industrial hemp under licenses issued pursuant to a new North Dakota statute, N.D. Cent. Code § 4-41-02, would not violate the federal Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.* ("CSA") (Compl.; AA. 11-31). On August 20, 2007, DEA filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). (Docket Entry 8, 9 and 10). On September 19, 2007, the farmers filed a cross-motion for summary judgment, attaching a number of affidavits and exhibits. (Docket Entry 11, 12 and 13).

On October 19, 2007, DEA filed a consolidated reply in support of its motion to dismiss and opposition to the plaintiffs' motion for summary judgment. (Docket Entry 22 and 23). DEA also filed a motion to stay consideration of the summary judgment motion until the District Court decided the motion to dismiss or, in the alternative, an extension of time in

which to supplement its opposition to the motion for summary judgment. (Docket Entry 24 and 25). The farmers filed a reply to DEA's consolidated opposition (Docket Entry 27) and to DEA's motion to stay. (Docket Entry 30).

The District Court heard oral argument on all pending motions on November 14, 2007. On November 28, 2007, the District Court issued an Order granting DEA's motion to dismiss and denying the farmers' summary judgment motion as moot. (Order Granting Defs.' Mot. to Dismiss; AA. 32-53).

STATEMENT OF THE FACTS

In their Complaint, the two North Dakota farmers alleged that industrial hemp is a commonly used term for non-psychoactive, non-drug varieties of the species *Cannabis sativa L.* that are cultivated for industrial rather than drug purposes. (Compl. ¶ 14; AA. 15). The federal Controlled Substances Act defines the term "Marihuana" to include "all parts of the plant *Cannabis sativa L.*," but specifically *excludes* from the definition of "Marihuana" hemp stalk, fiber, sterilized seed and seed oil. 21 U.S.C. § 801(16). This statutory exclusion of hemp stalk fiber, sterilized seed and oil from the scope of the CSA has enabled U.S. businesses to legally to import, purchase, use and trade in such hemp stalk, fiber, seed and oil and products made from those exempt parts of the plant. (Compl. ¶ 16; AA. 15). Hemp fiber, oil and food products are available throughout the U.S., Canada, Europe, Asia and Australia. (*Id.*). While it is lawful for U.S. producers to import hemp stalk, fiber, seed and oil from Canada and elsewhere to manufacture these products, because the plant itself is treated by DEA as "Marihuana," a Schedule I controlled substance, even if the plants contain absolutely zero THC content, U.S. farmers cannot grow the plant itself in the

United States. (*Id.* at ¶¶ 27-29; AA. 19-20).

In 2005, the North Dakota Legislative Assembly enacted a law permitting a person within the State to plant, grow, harvest, possess process sell and buy industrial hemp upon meeting certain requirements and obtaining a license from the state Agriculture Commissioner. N.D. Cent. Code. § 4-41-01 (2006). That law defines "industrial hemp" to mean a cannabis plant "having no more than three tenths of one percent" of tetrahydrocannibinol, the psychoactive element of marijuana ("THC"). (*Id.*). The law required the North Dakota Commissioner of Agriculture to adopt rules for the testing of industrial hemp plants during growth and for strict supervision of the crop during its growth and harvest. N.D. Cent. Code §4-41-02(3). Under regulations issued by the Commissioner of Agriculture, all parts of the cannabis plant other than those expressly exempted from the CSA cannot be sold or transferred to anyone other a DEA-registered processor. N.D. Admin. Code § 7-14-02-04(1)(d). Thus, North Dakota regulations effectively ensure than no part of the plant other than those allowed under federal law will leave the farmer's property. (Compl. ¶ 35; AA. 21).

The Complaint made the factual allegation that because North Dakota law and regulations permit a THC content of no more than 3/10 of one percent, a virtually non-existent level of THC, even the parts of the industrial hemp plant regulated by the CSA (such as the flowers) "have no potential for drug use." (Compl. ¶ 15; AA. 15). The Complaint made the additional factual allegation that for industrial hemp grown and regulated pursuant to North Dakota law, "there is absolutely no risk of diversion of drug marijuana by reason of the cultivation of the hemp plants themselves, which are useless as drug marijuana and the mere cultivation of which cannot in any way affect commerce, whether intrastate or interstate, in drug marijuana." (*Id.* at ¶ 70; AA. 29).

Appellant Rep. Monson, himself a member of the North Dakota House of Representatives and the Republican assistant majority leader, owns a farm near Osnabrock, Cavalier County, North Dakota, a property on which he has farmed with his family continuously for 32 years. (Compl. ¶¶ 10; 40; AA. 19; 23). Rep. Monson wants to plant industrial hemp in order to remove the seeds, press the seed into oil and ship the oil and/or sterilized seed to customers. (*Id.* at ¶ 50; AA. 25). Mr. Hague operates a farm in Ray,

North Dakota. (*Id.* at ¶ 11; AA. 14). He and his family have been engaged in farming for more than 100 years. (*Id.*). Mr. Hague currently produces and sells malting barley seed and Eclipse black bean seed. (*Id.*). Mr. Hague would like to raise and supply other farmers with certified industrial hemp seed. (*Id.* at ¶ 51; AA. 25).

In January 2007, the farmers each applied to the North Dakota Commissioner of Agriculture for licenses to cultivate industrial hemp under the state regulatory system. (*Id.* at ¶¶ 38-39; AA. 22-23). In February 2006, both farmers received the requested licenses. (*Id.*). At the time, the state regulations required that licenses issued by the North Dakota Commissioner of Agriculture would not be effective unless the state licensee also received a registration (license) from the DEA. N.D. Admin. Code § 7-14-02-04(3).[1]

In February 2007, the farmers each applied to DEA for federal registrations. (Compl. ¶ 53; AA. 25). DEA did not take final action on those applications. (*Id.* at ¶¶ 55-60; AA. 23-30). In their Complaint, the farmers alleged DEA would never act on the applications because the agency had indicated in correspondence that it would treat the farmers' cultivation of industrial hemp as manufacture of a Schedule I controlled

[1] In 2007, the North Dakota Legislative Assembly amended state law to provide that a license issued by the State "is not conditioned on or subject to review of or approval by the United States Drug Enforcement Administration." N.D. Cent. Code § 4-41-02, as amended by House Bill 1020.

substance. (*Id.* at ¶ 62; AA. 27). The farmers also noted in their Complaint that in 1998, North Dakota State University applied for a DEA registration to plant a test plot of industrial hemp for research purposes, and that after nearly 10 years, the University had not received any decision on its application. (*Id.* at ¶ 61; AA. 27).

On June 18, 2007, the farmers filed their Complaint in the U.S. District Court for the District of North Dakota seeking a declaratory judgment that their planned cultivation of industrial hemp pursuant to state license and under the state regulatory regime would not violate the CSA. (Compl.; AA. 11-31). The Complaint contended the CSA does not prohibit the planned cultivation for two reasons. First, Congress's own findings and the legislative history of the CSA make clear Congress did not intend to preclude a state-regulated regime in which only the non-regulated parts of the hemp plant would enter commerce, and there is absolutely no risk of diversion of drug marijuana by reason of the cultivation of the hemp plants themselves, which are useless as drug marijuana. (*Id.* at ¶ 70; AA. 29). Second, the CSA cannot be interpreted to prohibit the planned intrastate cultivation because federal regulation of such cultivation, in the absence of

any effect - much less a substantial economic effect - on interstate commerce in the plant or in those components of the plant which Congress has chosen to regulate under the CSA, would exceed congressional power under the Commerce Clause. (*Id.* at ¶ 72; AA. 30). The farmers contended "DEA would be extending its authority under the CSA into areas of interstate commerce Congress has expressly chosen not to regulate under the CSA. In-state industrial hemp plants themselves are in no way fungible with drug marijuana, ...as no part of the industrial hemp plant has utility as a drug. The regulated parts of industrial hemp plants could not possibly be diverted into and 'swell" or increase the supply of drug marijuana." (*Id.*)

DEA filed a motion to dismiss the farmers' Complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), arguing Section 877 of the CSA confers jurisdiction exclusively in the Courts of Appeal; that the farmers lacked standing; and that the farmers' claims were not ripe. (Docket Entry 8, 9 and 10). DEA also moved for dismissal for failure to state a claim, Fed. R. Civ. P. 12(b)(6), on the grounds that the CSA regulates all forms of cannabis as a controlled substance. (*Id.*) The farmers filed a cross-motion for summary judgment, accompanied by affidavits from

themselves and two expert witnesses. (Docket Entry 11, 12 and 13). DEA filed an opposition to the motion for summary judgment, but did not submit any opposing affidavits. Instead, DEA asked the District Court to stay ruling on the summary judgment motion until after ruling on the motion to dismiss or, in the alternative, to allow DEA more time to develop opposing affidavits. (Docket Entry 24 and 25).

Following oral argument, the District Court issued an order granting DEA's motion to dismiss. (Order Granting Defs.' Mot. to Dismiss; AA. 32-53). Although the District Court referenced the standard of review on summary judgment in its Order (*Id.* at 7; AA. 53), the District Court did not rule on the merits of the summary judgment motion. Rather, the Court denied the summary judgment motion as moot. (*Id.* at 22; AA. 53).

With respect to DEA's argument under Rule 12(b)(1), the District Court found that it did have subject matter jurisdiction, the farmers have standing, and their claims are ripe for consideration. (*Id.* at 8-13; AA. 39-44). Turning to DEA's motion to dismiss for failure to state a claim under Rule 12(b)(6), the District Court relied on this Court's decision in *United States v. White Plume*, 447 F.3d 1067 (8th Cir. 2006), to incorrectly

conclude that because industrial hemp plant "at some point contains psychoactive levels of THC" and because the plant can be viewed as "THC-containing material," "a growing Cannabis plant is therefore a Schedule I controlled substance." (*Id.* at 16; 21; AA. 47; 52). The Court also correctly noted that "Cannabis plants are 'marijuana' regardless of their THC concentration" under existing federal law. (*Id.* at 17; AA. 48).[2] The District Court did not address the effect of the North Dakota law other than to hold that the fact that the state "has chosen to regulate the growth of Cannabis in a manner contrary to federal law does not change its status as a Schedule I controlled substance under federal law." (*Id.* at 18; AA. 49).

With respect to the farmers' Commerce Clause argument, the District Court first held Congress could "regulate the production of commodities that remain intrastate as part of its regulation of the interstate market for those same commodities." (*Id.* at 19; AA. 50). Second, the District Court found that "components of [the farmers'] Cannabis plants are destined for interstate commerce." (*Id.* at 19; AA. 50). Finally, the District Court found

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[2] In fact, hemp plants are treated as "Marihuana" under the CSA only because they are technically of the same species as marijuana (Cannabis sativa L.) and *not*, as suggested by dicta in *White Plume*, because they contain a trace amount of THC. 447 F.3d at 1073. Even if an industrial hemp plant contained absolutely no THC at any stage of its growth, the plant would still be controlled under the CSA a "Marihuana." As the Court made clear in *Hemp Indus. Ass'n v. DEA*, the separate listing of "THC" in the CSA refers only and exclusively to synthetic forms of THC, not to natural THC within the marijuana plant. 357 F.3d 1012, 1017 (9th Cir. 2004).

there is no "reliable way" to distinguish hemp from marijuana for drug enforcement purposes. (*Id.* at 20; AA. 51).

SUMMARY OF ARGUMENT

This Court's decision in *White Plume* did not address the situation in this case: the cultivation of industrial hemp within a regime of state regulation in which only non-psychoactive hemp can be grown and in which none of the plant itself enters commerce at all, whether intrastate or interstate, other than those parts already exempt from federal law. In their Complaint for a declaration that their planned cultivation of industrial hemp would not violate the federal Controlled Substances Act, the appellant farmers made two key factual allegations: (1) that the industrial hemp plant is useless as, and in no way fungible with, drug marijuana; and (2) that there is no risk of diversion as drug marijuana by reason of cultivation of the hemp plants themselves and thus no possible effect on interstate commerce in drug marijuana.

The District Court erroneously declined to accept these allegations as true for purposes of ruling the Government's motion to dismiss and, instead, made and relied on contrary factual findings. The farmers contended that, by applying the CSA to their proposed cultivation of industrial hemp under North Dakota law, DEA would be extending its authority under the CSA

into areas of interstate commerce Congress has expressly chosen *not* to regulate: commerce in hemp stalk, fiber seed and oil. And, the farmers contended, because industrial hemp plants themselves are not fungible with drug marijuana and could not be diverted into or increase the supply of drug marijuana, there is no basis under the Commerce Clause for Congress to regulate intrastate cultivation of industrial hemp under North Dakota law in order to effectuate its regulate of interstate commerce in drug marijuana.

The District Court's factual findings contrary to the allegations of the Complaint—namely, its findings that industrial hemp is the "same commodity" as drug marijuana and that there is a risk of diversion—led the District Court to conclude, erroneously, that the CSA could constitutionally be extended to ban the intrastate cultivation of industrial hemp authorized and regulated by North Dakota law. If the farmer's allegations are accepted as true, it is clear that Congress would have no basis for regulating intrastate cultivation of industrial hemp in order to make its regulation of drug marijuana effective; and, therefore, that the CSA could not constitutionally be extended to prohibit the farmers' planned cultivation of industrial hemp under the North Dakota law. By failing either to so rule or to find that this

factual issue was in dispute and to proceed to rule on plaintiff's cross-motion for summary judgment, the District Court erred and its judgment should be reversed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO ACCEPT THE ALLEGATIONS OF THE COMPLAINT AS TRUE IN RULING ON A MOTION TO DISMISS UNDER RULE 12(B)(6).

A. Standard of Review

This Court "'review[s] the grant of a motion to dismiss de novo, taking all well pleaded factual allegations as true and drawing all reasonable inferences in favor of the plaintiff.'" *168th & Dodge, LP v. Rave Reviews Cinemas, LLC*, 501 F.3d 945, 950 (8th Cir. 2007) (*quoting Katun Corp. v. Clarke*, 484 F.3d 972, 975 (8th Cir. 2007)). "'A motion to dismiss should be granted only if it appears beyond doubt that the plaintiff can prove no set of facts to warrant a grant of relief.'" *Katun*, 484 F.3d at 975 (*quoting Knierem v. Group Health Plan, Inc.*, 434 F.3d 1058, 1060 (8th Cir. 2006)). The District Court erroneously failed to accept the farmers' well-pleaded factual allegations as true. Reviewing the motion to dismiss de novo and applying the proper standard, this Court should reverse the District Court's decision.

B. The District Court Erred in Granting DEA's Rule 12(b)(6) Motion.

The District Court erred in failing to accept the factual allegations of the Complaint as true for purposes of ruling on the Government's motion to dismiss. "For the purposes of a motion to dismiss, the Court takes all facts alleged in the complaint as true... Further the Court must construe the allegations in the complaint and reasonable inferences arising from the complaint favorably to the plaintiffs." *Knapp v. Tinder*, 183 F.3d 786, 788 (8th Cir. 1999). As this Court stated in *Schmedding v. Tnemec Co., Inc.* in considering a Rule 12(b)(6) motion to dismiss:

> We must assume that all the facts alleged in the complaint are true... [A]s a practical matter, a dismissal under Rule 12(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.

187 F.3d 862, 864 (8th Cir. 1999). In this case, the District Court failed to accept as true the allegations of the Complaint as required by Rule 12(b)(6). Particularly, the District Court did not accept as true the allegations that the industrial hemp plant itself is useless as drug marijuana and that there is no way industrial hemp could be diverted to use, or cause the diversion to use, of drug marijuana. Because the District Court failed to adhere to the

standard applicable to a Rule 12(b)(6) motion to dismiss, its decision should be reversed.

As the District Court recognized, the "stalk, fiber, sterilized seed and oil of the industrial hemp plant, and their derivatives, are legal under federal law, and those parts of the plant are expressly excluded from the definition of 'marijuana' under the Controlled Substances Act, 21 U.S.C. §801(16)."[3] (Order Granting Defs.' Mot. to Dismiss at 1; AA. 32). At the same time, as this Court has confirmed, the hemp plant itself is treated as "marijuana" under the CSA because it is technically of the same species—*Cannabis Sativa L.* *White Plume*, 447 F.3d at 1071 ("Congress clearly defined 'marijuana' as *Cannabis sativa L.* in the CSA"). The District Court relied on *White Plume* to conclude that a growing industrial hemp plant is a Schedule I controlled substance.

The District Court's reliance on *White Plume* is misplaced, however. *White Plume* did not involve the situation presented in this case: the

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[3] The Controlled Substances Act defines the term "marihuana" as follows:

> [A]ll parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. *Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, ... or the sterilized seed of such plant which is incapable of germination.*

21 U.S.C. § 801(16) (emphasis added).

cultivation of industrial hemp within a regime of state regulation in which only non-psychoactive hemp, useless as a drug, can be grown and *none* of the Cannabis sativa L. plant *itself* may enter the stream of commerce, intrastate or interstate, other than those parts of the plant explicitly exempted under federal law and seed useless for anything other than growing more non-psychoactive hemp.

The farmers made two key factual allegations in their Complaint that distinguish this case from *White Plume*. First, they alleged that the industrial hemp plant itself is "useless as drug marijuana" (Compl. ¶ 2; AA. 12), that the leaves and flowers of the industrial hemp "have no potential for drug use" (*Id.* at ¶ 15; AA. 15), and that "industrial hemp plants are in no way fungible with drug marijuana, whether moving in intrastate or interstate commerce, as no part of the industrial hemp plant has utility as a drug." (*Id.* at ¶ 72; AA. 30). Second, the Complaint alleged that "there is absolutely no risk of diversion of drug marijuana by reason of the cultivation of the hemp plants themselves, . . .the mere cultivation of which cannot in any way affect commerce, whether intrastate or interstate, in drug marijuana." (*Id.* at ¶ 70; AA. 29).

The District Court, however, relied on matters outside the Complaint and declined to accept these allegations as true for purposes of ruling on the DEA's motion to dismiss. First, the District Court found that "[t]he farming of industrial hemp requires growing the entire marijuana plant *which at some point contains psychoactive levels of THC*." (Order Granting Defs.' Mot. to Dismiss at 21; AA. 52) (emphasis added). Thus, the District Court effectively found or assumed, contrary to farmers' factual allegations, that industrial hemp *can* be used as drug marijuana.

Second, the District Court found, citing a U.S. Department of Agriculture report, that industrial hemp and drug marijuana "'are indistinguishable by appearance,'" such that "'there was no way to distinguish between marijuana and hemp varieties'" nor any "'reliable way to distinguish varieties for law enforcement purposes.'" (*Id* at 20; AA. 51), *quoting* USDA, INDUSTRIAL HEMP IN THE U.S.: STATUS AND MARKET POTENTIAL (2000)). In other words, the District Court erroneously failed to accept as true the plaintiff's factual allegation that there is "no risk of diversion of drug marijuana by reason of the cultivation of the hemp plants themselves." (Compl. ¶ 70; AA. 29).

The District Court further erred in explicitly relying on materials outside the pleadings—namely, the USDA Report—to find that that "there is no reliable way" to distinguish between industrial hemp and drug marijuana for drug enforcement purposes. The District Court likewise erred to the extent it implicitly relied on external materials to find that industrial hemp "at some point contains psychoactive levels of THC."

While the DEA may attempt to argue the District Court properly treated the motion to dismiss as a motion for summary judgment, and, thus, properly considered matters outside the pleadings, any such claim is without merit. To be sure, the farmers filed a cross-motion for summary judgment, including affidavits and exhibits, and the DEA filed an opposition to that motion with its own affidavits and exhibits. However, the District Court styled its decision as an "Order Granting Defendants' Motion to Dismiss." In its Order, the District Court expressly deemed the farmers' cross-motion for summary judgment moot, clearly implying it was not addressing the summary judgment motion. It is presumably for that reason that the District Court did not consider any of the farmers' or the Government's affidavits or exhibits in its ruling. Finally, the DEA itself specifically asked the District

Court to stay consideration of the plaintiff's motion for summary judgment until a ruling on the DEA's motion to dismiss; or, in the alternative, to allow the DEA to take discovery to develop information to dispute what plaintiffs asserted were undisputed material facts. (Docket Entry 24 and 25). Thus, any claim that the District Court treated the motion to dismiss as one for summary judgment must be rejected.

Indeed, if the District Court did evaluate DEA's motion to dismiss pursuant to Rule 12(b)(6) as one for summary judgment under Rule 56, the District Court failed to properly notify the farmers of that decision. Of course, Rule 12(b)(6) provides that if on a 12(b)(6) motion, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56..." If that was the District Court's intent, the parties should have been notified and the treatment of the motion as one for summary judgment should have been made clear. As this Court explained in *Country Club Estates, LLC v. The Town of Loma Linda*:

> Under Rule 12(b), if, on a motion to dismiss, a party submits to the court material outside the motion, and the court does not exclude this material, the motion then becomes a motion for summary judgment under Rule 56... [H]owever, a party against whom this procedure is used (here, the plaintiffs) is normally entitled to notice that conversion

> is occurring. . . . The general rule in this Circuit is that "strict compliance" with this notice procedure is required.

213 F.3d 1001, 1005 (8th Cir. 2000) (*quoting Kaestel v. Lockhart*, 746 F.2d 1323, 1324 (8th Cir. 1984) (per curiam)). The District Court should not have taken into account *any* matters outside the Complaint unless it was prepared to rule on plaintiffs' motion for summary judgment. Apart from citing the summary judgment standard in its opinion, the District Court gave no notice to the parties that it was considering the motion as one for summary judgment. As a result, the District Court should not have considered any materials outside the Complaint.

The District Court erred in declining to accept as true the farmers' factual allegations, for purposes of ruling on the DEA's Rule 12(b)(6) motion, that that the industrial hemp plant itself is useless as drug marijuana and that there is no way industrial hemp can be diverted to use as drug marijuana. Because the District Court failed to adhere to the appropriate legal standard, its decision must be reversed.

II. THE DISTRICT COURT'S FINDINGS OF FACT LED IT TO CONCLUDE ERRONEOUSLY THAT THE CSA CAN CONSTITUTIONALLY BE EXTENDED TO REACH THE PROPOSED INTRASTATE CULTIVATION OF INDUSTRIAL HEMP UNDER NORTH DAKOTA LAW.

A. Standard of Review

This Court's review of district court rulings on the constitutionality of statutes is de novo. *See, e.g., United States v. McMasters*, 90 F.3d 1394, 1397 (8th Cir. 1996). In assessing the scope of Congress' Commerce Clause authority, the question is whether a rational basis exists for Congress to conclude the petitioner's intrastate activities, taken in the aggregate, substantially affect interstate commerce in fact. *See United States v. Lopez*, 514 U.S. 549, 557 (1995). The District Court, relying on facts different than those alleged in the farmers' Complaint, erroneously held a rational basis exists upon which Congress could find the farmers' proposed intrastate activities substantially affect interstate commerce, such that the CSA could constitutionally apply to the farmers' proposed cultivation of industrial hemp. This Court, reviewing that determination de novo, should reverse.

B. The CSA Cannot, Consistent With the Limits Imposed by the Commerce Clause, Be Extended to Reach the Plaintiffs' Proposed Intrastate, State-Regulated Cultivation of Industrial Hemp.

The farmers alleged in their Complaint that to extend the CSA to the state-regulated activity permitted by North Dakota law and in which the farmers intend to engage, would exceed Congress's power under the Commerce Clause of the Constitution of the United States. (Compl. ¶ 72; AA. 30). Notably, no such claim was asserted in *White Plume* and the issue is thus one of first impression, in this and every other Circuit. The District Court's error in declining to accept the farmers' factual allegations as true in ruling on the motion to dismiss led the District Court to conclude that the farmers could not possibly prevail on this claim as a matter of law. However, because the District Court's factual findings were erroneous, its legal conclusion with respect to the Commerce Clause is likewise in error.

The Commerce Clause authorizes Congress "[t]o regulate Commerce with foreign Nations, and among the several States..." U.S. Const. Art. I, § 8. In other words, the Commerce Clause empowers Congress to regulate interstate commerce. It is well-established that Congress may also regulate

intrastate activity in a commodity fungible (identical) with the *interstate* commodity "if [the intrastate activity] exerts a substantial economic effect on interstate commerce....." *Perez v. United States*, 402 U.S. 146, 151 (1971) (*quoting Wickard v. Filburn*, 317 U.S. 111, 125 (1942)). An interpretation of the CSA which purports to regulate the farmers' proposed activities, however, results in an unconstitutional overstepping of its authority by Congress.

Certainly, Congress could choose to regulate interstate commerce in hemp stalk, fiber, non-viable seed and oil. However, Congress has expressly chosen *not* to regulate interstate commerce in those goods. As a result, any discussion of whether Congress could also choose to regulate *intrastate* commerce in those same commodities is precluded by the fact that Congress has explicitly chosen not to regulate even *interstate* commerce in those goods. It stands to reason that Congress, having chosen *not* to regulate interstate commerce in a class of products, cannot constitutionally regulate *intrastate* state-regulated and licensed activity that results only in putting that *same* class of products into commerce. In this case, this state-regulated activity presents no possibility of drug marijuana flowers being diverted--the

congressional interest under the CSA.

Even if Congress chose to regulate the interstate commerce in hemp stalk, fiber, non-viable seed and oil, it could not justify regulation of intrastate commerce for such goods on the basis that the intrastate trade could exert a substantial effect on the interstate market for drug marijuana. As explained by the farmers in their Complaint, there is simply no rational, factual basis to conclude intrastate industrial hemp production impacts the interstate drug marijuana market. Therein lies the critical distinction between this situation and that in the California medical marijuana case, *Gonzales v. Raich*, 545 U.S. 1 (2005), on which the District Court principally relied. (Order Granting Defs.' Mot. to Dismiss at 18-25; AA. 49-52).

In *Raich,* two California residents grew and used medical marijuana pursuant to physicians' prescriptions under the California Compassionate Use Act. The *Raich* plaintiffs sought a declaration that Congress exceeded its authority under the Commerce Clause in extending the Controlled Substances Act to their intrastate activities. Specifically, the farmers argued their intrastate production and use of marijuana was a purely local activity

and for personal consumption only, such that their activities did not significantly impact interstate commerce.

In reaching its decision in *Raich,* the Supreme Court re-affirmed the general principle of Commerce Clause jurisprudence that Congress has the power to regulate intrastate activities in a fungible commodity that "substantially effect" interstate commerce in that particular commodity. 545 U.S. at 17 (*quoting Wickard*, 317 U.S. at 125). The *Raich* Court noted that in adopting the CSA, Congress specifically found that "[l]ocal distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances." *Id.* at 13 n. 20. In *Raich*, the Court found Congress had a rational basis upon which to conclude production of fungible marijuana for personal consumption could substantially impact interstate commerce in drug marijuana. Thus, the Court upheld the CSA as applied to the *Raich* plaintiffs.

In reaching its decision, the *Raich* Court invoked the *Wickard* decision as the principal precedent for upholding Congress' power to regulate intrastate production of a regulated commodity. In *Wickard*, a farmer challenged the federal program setting quotas on raising wheat, on

the grounds that the only wheat he was growing would actually be consumed on the very farm on which he was growing it. The *Wickard* Court had ruled that federal law could, nevertheless, regulate and restrict that farming operation, because even home-grown wheat—multiplied by every farm that might grow wheat only for home consumption—was fungible (identical) with Congressionally-regulated interstate wheat and in aggregate would have a significant effect on the interstate wheat market.

As in *Wickard*, the *Raich* Court emphasized the fungible nature of the in-state drug medical marijuana with interstate recreational drug marijuana, explaining that this fungibility is exactly analogous to the fungibility of home-grown and interstate wheat in *Wickard*. *Id.* at 18-19. Given this fungibility, the *Raich* Court then found that high demand in the interstate market for marijuana would inevitably draw marijuana produced for in-state medical consumption into the interstate market, and in the aggregate, have a substantial effect on the supply and demand in the national market:

> In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market

conditions....

> More concretely, one concern prompting inclusion of wheat grown for home consumption in the 1938 Act was that rising market prices could draw such wheat into the interstate market, resulting in lower market prices. The parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market. While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety.

Id. at 19. In other words, the *Raich* decision turned on the fact that medicinal marijuana and drug marijuana were perfectly fungible commodities. As a result, the possibility of diversion of local medicinal marijuana into the interstate market for drug marijuana was substantial. In such circumstances, where the purely local activity will exert a substantial effect on the interstate market, Congress is within its power under the Commerce Clause to regulate the intrastate market for the commodity.

By contrast, in this case, there is no possible "diversion of homegrown [instate] marijuana." *Raich*, 545 U.S. at 19. First, North Dakota law requires that no plant and no part of the plant regulated by the CSA may ever

leave the farmer's property. The only activity that will affect interstate commerce is the sale of legal hemp stalk, fiber, sterilized seed and oil, substances that are not covered *at all* by the CSA. Second, there is no risk of unlawful diversion because industrial hemp and drug marijuana are not fungible commodities. (Compl. ¶ 2; AA. 12)(industrial hemp plant "useless as drug marijuana"); (*Id.* at ¶ 15; AA. 15)(industrial hemp plant has "no potential for drug use"); and (*Id.* at ¶ 72; AA. 30)(industrial hemp plants "in no way fungible with drug marijuana, whether moving in intrastate or interstate commerce, as no part of the industrial hemp plant has utility as a drug."). Additional supply in the intrastate market or even the interstate market for industrial hemp has no impact on the interstate market for drug marijuana. While viable hemp planting seed will be traded in some fashion intrastate, this activity will have no affect at all on interstate commerce in unlawful drug marijuana; there is no national market for viable hemp seeds because there is no use for viable hemp seeds as a drug and no possibility that such seeds can be used to grow drug marijuana. Similarly, there is no possibility of diversion of regulated non-drug industrial hemp flowers from the appellants' farms, as the flowers have no potential as a drug and are not

"fungible" with drug marijuana.

Congress chose to exempt hemp stalk, fiber, non-viable seed and oil from the CSA. In doing so, Congress chose *not* to regulate the interstate, much less the intrastate, market in those commodities. Indeed, Congress can have no "federal interest in eliminating commercial transactions" in hemp stalk, fiber, non-viable seed and oil. Congress has already decided that there is no federal interest, in that Congress has made interstate and foreign commerce in those items entirely *legal*. Even if the CSA purported to regulate intrastate industrial hemp trade, any interpretation of the CSA which purports prohibits the intrastate activities proposed by the farmers here renders the CSA unconstitutional as applied to the farmers in violation of Congress' Commerce Clause authority. The District Court erred in concluding otherwise and its decision should be reversed.

C. The District Court Erred In Dismissing Plaintiffs' Commerce Clause Claim Based on Findings of Fact Contrary to the Allegations of the Complaint.

The District Court ruled the farmers could not prevail on their Commerce Clause claim for two reasons. First, the District Court held that the Supreme Court "has clearly established that Congress may regulate the

production of commodities that remain intrastate as part of its regulation of the interstate market for those same commodities." (Order Granting Defs.' Mot. to Dismiss at 19; AA. 50). In finding that industrial hemp is the "same commodity" as drug marijuana for purposes of the Commerce Clause, the District Court declined to accept as true the allegations of the Complaint that hemp is *not* the same commodity because it is useless as drug marijuana. Rather than accept the farmers' allegations as true, the District Court cited this Court's language in *White Plume* to the effect that "problems of detection and enforcement easily justify a ban broader than the psychoactive variety of the plant." (*Id.* at 20 (*quoting White Plume*, 447 F.3d at 1076); AA. 51).[4] But in *White Plume*, this Court was *not* making a finding of fact about the fungibility of industrial hemp and drug marijuana. This Court was merely citing "problems of detection and enforcement" as a possible rationale for regulation of non-psychoactive *Cannabis sativa L.* under the CSA.

More importantly, the relevant inquiry for purposes of the Commerce Clause does not consider whether industrial hemp and drug marijuana are *legally* identical; it is indisputable they are both technically of the same

[4] This language was actually quoted by this Court from the case of *New Hampshire Hemp Council v. Marshall,* 203 F.3d 1, 6 (1st Cir. 2000).

species, and that species is covered by the CSA. The issue for purposes of the Commerce Clause is whether the commodities in question are *economically and functionally* fungible—like the drug medical marijuana and drug recreational marijuana in *Raich*. The farmers alleged that they are not. The District Court could not make a contrary factual finding in ruling on a motion to dismiss under Rule 12(b)(6).

Similarly, the District Court should not have relied on a USDA study to make a factual finding that the characteristics of drug marijuana and industrial hemp "do not offer a reliable way to distinguish varieties for drug enforcement purposes." (*Id.* at 20; AA. 51, *quoting* USDA, INDUSTRIAL HEMP IN THE U.S.: STATUS AND MARKET POTENTIAL (2000)). To the extent the District Court considered this factual issue to be material, it should have considered the affidavits and exhibits submitted by both parties and treated the motion as one for summary judgment. *Country Club Estates*, 213 F.3d at 1005.

Only by treating industrial hemp and drug marijuana as being functionally and economically fungible in contrary to the allegations in the Complaint could the District Court find that Congress could rationally

conclude "that the regulation of all Cannabis plants, regardless of their THC content, was necessary to make the regulation of marijuana effective." (Order Granting Defs.' Mot. to Dismiss at 20; AA. 51). Had the District Court instead assumed, as the farmers alleged, that the two are not fungible, it would have necessarily concluded that the farmers' proposed cultivation of industrial hemp in-state, under North Dakota law, cannot affect the market for drug marijuana *anywhere*—intrastate or interstate. Accepting the farmers' allegations as true, Congress would thus have no basis for regulating intrastate cultivation of industrial hemp in order to "to make the regulation of marijuana effective." (*Id.* at 20; AA. 51).

The District Court dismissed the farmers' Commerce Clause challenge for a second reason: that "the components of their Cannabis plants are destined for interstate commerce. . . As such, there is no question that Congress may regulate the growth of the plant." (*Id.* at 19; AA. 50). The District Court further reasoned that, "because growth of the Cannabis plant substantially affects the interstate market for commodities such as Cannabis fiber, seed and oil, Congress may regulate that growth." (*Id.* at 21; AA. 52).

To be sure, the "components" of the farmers' plants that will enter commerce at all—hemp stalk, fiber, seed and/or oil—are destined for interstate commerce. But those components are precisely the ones Congress has chosen *not* to regulate, as the District Court itself recognized: "The stalk, fiber, sterilized seed, and oil of the industrial hemp plant, and their derivatives, are legal under federal law, and those parts of the plant are expressly excluded from the definition of 'marijuana' under the" CSA. (*Id.* at 1; AA. 32). For that very reason, DEA "cannot regulate ... non-psychoactive hemp products—because nonpsychoactive hemp is not included in Schedule I" of the CSA. *White Plume*, 447 F.3d at 1073, *quoting Hemp Indus. Ass'n*, 357 F.3d at 1018).

The District Court's reliance on *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948) is also misplaced. In that case, the Court held that a scheme to fix the prices of sugar beets grown intrastate resulted in a restraint of trade in beet sugar sold interstate that was subject to the antitrust laws (the Sherman Act). The object of Congressional regulation in that case was the interstate trade in sugar—the commodity sold interstate. Here, contrary to the facts of *Mandeville*, Congress has chosen *not* to

regulate the commodities that are going to be sold interstate: hemp stalk, fiber, sterilized seed and oil. It simply makes no sense to conclude that Congress has power to and has regulated intrastate products (such as industrial hemp plants) because the resulting commodities will be sold in interstate commerce, where Congress has specifically chosen *not* to regulate those commodities being sold interstate.

The District Court should have accepted the factual allegations of the Complaint as being true for purposes of ruling on the motion to dismiss. Had the Court done so, it could not have dismissed the farmers' Commerce Clause claim for failure to state a claim upon which relief could be granted. The factual propositions relied on by the District Court were clearly material to its legal conclusions. The District Court should have proceeded to consider the farmers' cross-motion for summary judgment, and the affidavits and exhibits of both parties, and to determine if there was a genuine issue as to these material facts. For that reason, the District Court's decision to dismiss the farmers' Commerce Clause claim for failure to state a claim was erroneous.

CONCLUSION

For the reasons set forth above, the judgment of the District Court should be reversed and the case should be remanded for consideration of the farmers' cross-motion for summary judgment.

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