UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

David Monson **-and-** **Wayne Hauge,** **Plaintiffs,** **v.** **Drug Enforcement Administration** **-and-** **United States Department of Justice,** **Defendants.**	**Civ. No. 4:07-cv-00042 (DLH/CSM)** **Brief in Opposition to Defendants' Rule 12(b) Motion to Dismiss and In Support of Plaintiffs' Cross-Motion for Summary Judgment**

INTRODUCTION

This is the first and only case in the United States in which farmers seeking to cultivate industrial hemp have sought a declaration that they cannot be criminally prosecuted, under the federal Controlled Substances Act, 21 U.S.C. §§801 *et seq*., (the "CSA") for growing industrial hemp plants under a system of state regulation, now in effect, which ensures that the cultivated plants have no potential drug use and in which the only parts of the plant that will leave their farms and enter commerce, of any kind, are already exempt from that federal law. The issue before the Court is a pure question of law: whether the CSA applies to Plaintiffs' proposed cultivation of industrial hemp pursuant to North Dakota's state regulatory regime. Therefore, in addition to opposing the Defendants' Motion to Dismiss, Plaintiffs have filed a cross-motion for Summary Judgment on this legal issue. Plaintiffs offer

this brief both in opposition to Defendants' Motion to Dismiss and in support of Plaintiffs' Motion for Summary Judgment.

The industrial hemp plant is a variety technically of the same species of plant as marijuana—*Cannabis sativa L*—but one that has that has been bred to such a low concentration of the psychoactive element of marijuana, tetrahydrocannabinol or THC, as to be completely useless as a narcotic drug. *See* N.D.C.C. § 4-41-01(limiting industrial hemp to a THC level of no more than three-tenths of one percent); Declaration of Gero Leson, attached hereto as Exhibit D ("Leson Dec.") ¶¶8-9. The stalk, fiber, sterilized seed and oil of the industrial hemp plant, and their derivatives, are *legal* under federal law and have been for 70 years. Indeed, those parts of the plant are expressly excluded from the definition of "marijuana" under the CSA, 2 U.S.C. §802(16). This statutory exclusion has allowed the widespread use and trade of hemp stalk, fiber and sterilized hemp seed and seed oil. These hemp commodities are sold throughout the U.S. and the world, and a wide variety of products are made from hemp in the U.S. and are sold here. *See* Affidavit of Dr. T. Randall Fortenberry, attached hereto as Exhibit C ("Fortenberry Aff.") ¶4-11.

The State of North Dakota enacted a law authorizing cultivation of industrial hemp so that its own farmers could supply the legal parts of the plant—stalk, fiber, seed and oil—that would otherwise have to be imported from other countries. N.D.C.C. §§ 4-41-01, 4-41-02, 5-05.1-02, 4-05.1-05, 4-09-01(20)(a), 12-60-24(2)(b), and N.D.Admin. Code, Article 7-14. This state regulatory regime provides for licensing of farmers to cultivate industrial hemp; imposes strict THC limits precluding any possible use of the hemp as drug marijuana; and ensures that no part of the hemp plant will leave the farmer's property other than those parts already exempt under federal law. The Plaintiffs in this case are two North Dakota farmers, State Rep. David Monson and Wayne Hauge, who have received state licenses, have a

compelling economic need to begin cultivation of industrial hemp, and stand immediately ready to do so, but are unwilling to risk federal prosecution of possession for manufacture or sale of a controlled substance. *See* Affidavit of David Monson, attached hereto as Exhibit A ("Monson Aff."); Affidavit of Wayne Hauge, attached hereto as Exhibit B ("Hauge Aff."). That is why they seek a declaratory judgment that the CSA does not prohibit their cultivation of industrial hemp pursuant to their state licenses.

Contrary to the contention of Defendant Drug Enforcement Administration ("DEA"), this Court has jurisdiction to consider this claim and grant the requested relief. First, there is no "final decision" of the DEA at issue here and therefore the CSA provision for exclusive review of such "final decisions" by the Courts of Appeal is inapplicable. Plaintiffs are not appealing the denial of an application for a DEA license to cultivate industrial hemp. Rather, they are contending that no DEA license is needed because the CSA does not apply.

Second, it is well-established that Plaintiffs are not required to expose themselves to the risk of prosecution under a federal criminal statute in order to challenge the statute in federal court. Rep. Monson and Mr. Hauge have clearly established their specific willingness, ability and intent to cultivate industrial hemp. Accordingly, they have standing to seek a determination as to whether the CSA would render their state-licensed cultivation of industrial hemp a federal criminal offense before engaging in that activity. Their claim is ripe for adjudication because the issue is purely one of law. They are not required to apply for a license from DEA when they are challenging the application of the law that would require them to obtain such a license. In any event, given the DEA's refusal to act at all on North Dakota State University's application, as explained below, any attempt to seek such a license is destined to be a futile one.

On the merits, based on the undisputed facts, the CSA does not apply to Plaintiffs' proposed cultivation of industrial hemp and they are, therefore, entitled to judgment as a matter of law. Neither of the cases principally relied upon by DEA—*United States v. White Plume*, 447 F.3d 1067 (8th Cir. 2006) and *New Hampshire Hemp Council v. Marshall*, 203 F.3d 1 (1st Cir. 2000)—involved a system of state regulation imposing THC limits precluding any possible illicit drug use of hemp. Neither case involved a state-enforced system in which only the exempt parts of the hemp plant enter interstate commerce. The CSA cannot and does not prohibit cultivation of industrial hemp within such a system. *First,* Congress simply did not intend the CSA to reach state-regulated, purely intrastate cultivation of non-drug non-psychoactive hemp in which only the non-regulated parts of the plant will enter commerce of any kind. *Second*, the CSA cannot reasonably be interpreted to prohibit in-state cultivation of industrial hemp where there is no risk of diversion to illicit drug use. *Third*, extending the CSA to the in-state cultivation of industrial hemp permitted and regulated by North Dakota law would exceed Congress' power under the Commerce Clause.

STANDARD OF REVIEW

Defendants have moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) and Plaintiffs have cross-moved for summary judgment pursuant to Fed. R. Civ. P 56(a). "'Summary judgment is appropriate only when the pleadings, deposition and affidavits submitted by the parties indicate no genuine issue of material fact and show that the moving party is entitled to judgment as a matter of law.'" *Federer v. State of North Dakota*, 447 F. Supp. 2d 1053, 1063, (D.N.D. 2006), *quoting Uhiren v. Bristol-Myers Squibb Co.*, 346 F.3d 824, 827 (8th Cir. 2003).

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER PLAINTIFFS' CLAIMS

A. CSA Section 877 Is Inapplicable

DEA contends that this Court lacks subject matter jurisdiction because the CSA confers exclusive jurisdiction to review any "final decision" of that agency on the United States Courts of Appeal. Defendants' Brief in Support of Their Motion to Dismiss ("DEA Br.") at 8, *citing* 21 U.S.C. §877. In this case, however, Plaintiffs are not challenging any "final decision" of DEA, such as denial of a license application or promulgation of a rule. Rather, they are a seeking a declaration that the CSA does not apply to their planned cultivation of industrial hemp pursuant to North Dakota state law and therefore that they cannot be prosecuted under the CSA. No "final decision" of DEA is at issue and 21 U.S.C. § 877 is inapplicable.

The propriety of a District Court's exercise of jurisdiction over a claim like the one presented in the instant case was indicated in *New Hampshire Hemp Council, Inc. v. Marshall*, 203 F.3d 1 (1st Cir. 2000)(cited by DEA, DEA Br. at 17-18). In *New Hampshire Hemp Council*, Plaintiffs brought an action in United States District Court for a declaratory judgment that the CSA did not prohibit their planned cultivation of industrial hemp. The District Court dismissed for lack of standing; the Court of Appeals held that there was standing and ripeness, but ruled that the requested declaration should be denied on the merits. Subject matter jurisdiction was not questioned by the Court of Appeals.

Section 877 cannot preclude a District Court from assuming jurisdiction over an action against DEA where there is simply no "final decision" of that agency to be reviewed. In *PDK Labs, Inc. v. Reno*, 134 F. Supp. 2d 24 (D.D.C. 2001), the District Court held that it could assume jurisdiction over a challenge to a DEA interpretative letter which did "not

constitute a final determination, finding or conclusion within the meaning of [21 U.S.C. §] §877." *Id*. at 29. In *Novelty, Inc. v. Tandy*, 2006 U.S. Dist. LEXIS 57270 (S.D. Ind. 2006), the District Court held that it had jurisdiction over a challenge to DEA's practice of sending letters directing sellers of certain chemicals to take certain actions with respect to transportation and storage. The Court ruled that "the most persuasive view is that §877 does not apply where there has been no formal finding, conclusion or determination based on a record that provides a meaningful basis for judicial review." *Id*. at *10. *See also*, *Wedgewood Village Pharmacy Inc. v. Ashcroft*, 293 F. Supp. 2d 462, 468 n. 2 (D.N.J. 2003)(21 U.S.C. § 877 did not deprive District Court of jurisdiction where there was no actual factual determination by the agency).

Doe v. DEA, 484 F.3d 561 (D.C. Cir. 2007), on which DEA principally relies, DEA Br. at 8-9, does not in any way dictate a contrary result. That case challenged the specific denial by DEA of an application for a permit to import a drug that had not been approved by the FDA. The applicant was seeking to import the drug so that it could conduct testing in order to obtain FDA approval. The D.C. Circuit held that the denial of the permit was a final agency action of DEA and that 21 U.S.C. § 877 was not rendered inapplicable by the lack of an administrative record. Furthermore, the Court distinguished the situation before it from one in which "meaningful judicial review would have been entirely foreclosed." *Id*. at 569 *citing McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991)(statute vesting jurisdiction in Courts of Appeals did not preclude district court jurisdiction over a class action challenging a practice of constitutional violations of Immigration and Naturalization Service). The D.C. Circuit did not address—and had no occasion to address--the application of 21 U.S.C. § 877 in a case in which no specific DEA decision of any kind is being challenged. In such a case,

21 U.S.C. § 877 cannot apply and, if there is to be any review of Plaintiffs' request for a declaratory judgment, it must be in this Court.

DEA also suggests that "[i]f the challenged decision is not 'final,' Plaintiffs may not bring an action in *any* court." DEA Br. at 9. This case does not involve a DEA "decision" of any kind. Plaintiffs here seek a declaratory judgment that DEA cannot prosecute them for cultivating industrial hemp under their state-issued licenses. The Administrative Procedure Act and Declaratory Judgment Act, 28 U.S.C. §2201, confer authority on this Court to afford that remedy. If it were true that Plaintiffs could not seek such relief in *any* court, that would be precisely the type of case in which the D.C. Circuit in *Doe* acknowledged a District Court could assume jurisdiction, notwithstanding 21 U.S.C. § 877. 484 F.3d at 569. This Court, therefore, has jurisdiction over Plaintiffs' claims for relief in this case.

B. Plaintiffs Have Standing to Pursue Their Claims

To establish standing, a Plaintiff must demonstrate "it has suffered an 'injury-in-fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Coleman McClain v. American Economy Ins. Co*., 424 F.3d 718, 731 (8th Cir. 2005), *quoting Friends of the Earth, Inc. v. Laidlaw Environmental Servs. Inc*., 528 U.S. 167, 180 (2000). DEA contends that Rep. Monson and Mr. Hauge cannot show such injury-in-fact because they "have been neither subjected to prosecution nor threatened with prosecution." DEA Br. at 11.

It is well-established, however, that "[p]laintiffs… are not required to expose themselves to arrest or prosecution under a criminal statute in order to challenge a statute in federal court." *Arkansas Right to Life State PAC v. Butler*, 146 F.3d 558, 560 (8th Cir. 1998). Rather, "[w]hen government action or inaction is challenged by a party who is a target or object of that action, as in this case, 'there is ordinarily little question that the action or

inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.'" *Minnesota Citizens Concerned for Life v. Federal Election Comm'n*, 113 F.3d 129, 131 (8th Cir. 1997).

Applying these principles, the Court of Appeals in *New Hampshire Hemp Council, supra*, found that the Plaintiff farmer had standing to seek a declaration that the CSA did not prohibit his proposed cultivation of industrial hemp. Unlike this case, no state law authorizing the cultivation of hemp was yet in effect. As in this case, DEA argued that Plaintiffs lacked standing to bring such a pre-enforcement challenge. The Court of Appeals disagreed and ruled that the Plaintiff farmer did indeed have standing:

> We think that the threat of federal prosecution here is realistic. [Plaintiff] Owen, a farmer as well as a legislator, proposes to grow cannabis sativa plants to produce industrial products if permitted to do so. The DEA has made clear, both by its conduct in New Hampshire and elsewhere, that it views this as unlawful under the federal criminal statutes governing marijuana…..Nor, as the medical-use controversy bears out,….is there any reason to doubt the government's zeal in suppressing any activity it regards as fostering marijuana use.

New Hampshire Hemp Council, 203 F.3d at 5.

It is untrue, as DEA suggests, that Rep. Monson and Mr. Hague "have neither violated nor expressed any intent to violate, the CSA." DEA Br. at 11. The Plaintiff farmers each went to the trouble to apply for and obtain a state license; they are both experienced farmers with the land, resources, and know-how to plant and harvest industrial hemp and they have stated clearly that they intend to plant their first hemp crop, have indicated exactly where, how, and when they intend to grow hemp. Monson Aff. ¶¶ 2, 5, 6, 22; Hauge Aff. ¶¶ 2-4, 16. Plaintiffs are not, therefore, alleging some kind of "subjective chill," DEA Br. at 11, nor are they seeking "an advisory opinion" about federal marijuana policy. *Id*. at 12. They stand immediately ready, willing and able to cultivate industrial hemp under their state licenses and they face a real and imminent threat of prosecution if they do so. DEA does not

and cannot contend that it does not vigorously enforce the CSA provisions making manufacture, possession, sale, etc., of what it considers marijuana a federal felony or that the criminal penalties for violation of those provisions are anything but severe.

In these circumstances, Plaintiffs' clear standing is not in any way undercut by DEA's suggestion that Plaintiffs are not in "imminent danger of prosecution". DEA Br. at 11. A "Plaintiff who alleges a threat of prosecution that 'is not imaginary or wholly speculative' has standing to challenge the statute." *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 485 (8th Cir. 2006), *quoting Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979). In *St. Paul Area Chamber*, the Court found standing based on the fact that "the Plaintiffs here have alleged a specific intent to pursue conduct in violation of the challenged statute." *Id*. at 487, *quoting Butler, supra*, 146 F.3d at 560. That is demonstrably true in the instant case. For these reasons, Plaintiffs have standing to bring their claim.

C. Plaintiffs' Claim Is Ripe for Adjudication

DEA further argues that Plaintiffs' claim is not ripe for adjudication because the two farmers, Rep. Monson and Mr. Hauge, have not demonstrated any possible "hardship" from the withholding of court consideration. DEA Br. at 13. DEA contends that Plaintiffs cannot demonstrate any hardship "justifying judicial review prior to DEA's resolution of their registration applications," and that if, "as Plaintiffs speculate, the DEA denies their registration applications, Plaintiffs may seek judicial review of that denial" in the Court of Appeals. DEA Br. at 13-14.

That argument, however, was squarely addressed and rejected by the Court of Appeals in *New Hampshire Hemp Council, supra,* in which the Plaintiff farmer had not even applied for a DEA license to cultivate hemp:

> As for ripeness, the issue posed…is an abstract one of statutory interpretation…….
>
> The DEA points out that it can license marijuana production…and that Owen [the Plaintiff farmer] has not sought a license. But whether viewed as a ripeness objection or one based on a failure to exhaust remedies, the objection is unsound here, even if there were some realistic prospect of a license for Owen. Owen's position is that his proposed production of industrial products is not marijuana production under the statute and therefore not subject to the statute at all, whether as a prohibition or licensing scheme. If he were correct, it is hard to see why he should be forced to apply for a license.

203 F.3d at 6 (emphasis added). Exactly the same is true in this case.

In this regard, the instant case is not analogous to *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967), relied upon by DEA, in which application of the challenged regulations, in the first instance, required further administrative actions and decisions. Rather the situation is akin to that in the companion case, *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), in which petitioners faced the threat of immediate criminal sanctions for defying the regulations and the Court held the issue was indeed ripe for review.

> Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the Plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance…."

387 U.S. at 153.[1]

To the extent that DEA is actually contending that, having applied for federal registrations, Plaintiffs should await DEA's decision on those applications, DEA Br. at 14,

[1] It should be noted that the only reason Plaintiffs applied to DEA for registrations is that, formerly, under North Dakota law, a farmer needed first to obtain a DEA registration prior to obtaining a state license. *See* N.D.Admin Code § 7-14-02-04(2) and (3)(repealed). During the 2007 Legislative Session, however, in response to DEA's correspondence with state officials indicating the agency's intention to review such license requests as if Plaintiffs were simply planning to grow drug marijuana, (see DEA Br. Ex. B at 2), the state law was amended to eliminate the requirement that a DEA license be obtained prior to planting industrial hemp. House Bill 1020, 60th Leg. (N.D. 2007). Current North Dakota law does not require that Plaintiffs' obtain a DEA license prior to growing industrial hemp under the North Dakota statute. N.D.C.C. § 4-41-02(4).

DEA is presumably raising the doctrine, not of ripeness, but of failure to exhaust administrative remedies. As a logical matter, as the Court in *New Hampshire Hemp Council* explained, a party should not be required to apply for a license under a regulatory scheme that the party contends does not apply at all to his situation. 203 F.3d at 5-6. But even if the doctrine of exhaustion were applicable, a "party may be excused from exhausting administrative remedies ….if further administrative procedures would be futile." *Ace Property & Casualty Ins. Co. v. Federal Crop Ins. Corp*., 440 F.3d 992, 1000 (8th Cir. 2006). If there were ever situation in which resort to administrative procedures is demonstrably futile, this is it. First, DEA has clearly prejudged the merits of the applications for registration by characterizing them as requests being submitted by "manufacturers of marijuana—which is the most widely abused controlled substance in the United States…." Letter from DEA to North Dakota Agriculture Commissioner Roger Johnson, Feb. 1, 2007, DEA Br. Exhibit B.

Second, here, as made clear by the Affidavit of Burton Johnson, attached hereto as Exhibit E ("Johnson Aff."), it is unlikely DEA will ever act on these applications. Prof. Johnson states that NDSU was directed, by N.D. Century Code § 4-05.1-05, to "collect feral hemp seed stock and develop appropriate adapted strains of industrial hemp containing less than 3/10 of one percent THC in the dried flowering tops." Johnson Aff. ¶5. He further explains that:

> Pursuant to this legislative mandate, NDSU submitted its own application to DEA for a registration for cultivation of industrial hemp for research purposes, on September 28, 1999. . . . NDSU proposed to plant 160,000 viable seeds to produce 144,000 hemp plants in the field, and to evaluate characteristics including emergence, growth and development, phenology, pest incidence, seed and biomass yield and seed and biomass quantity.

Id. ¶ 6. Prof. Johnson confirms, however, that, to date – nearly *eight (8)* years after its filing, the DEA has not acted on NDSU's application. *Id*. ¶7.

Manifestly, then, the issue presented by Plaintiffs in this action would never be addressed and resolved by the DEA through the registration process. The issue presented is purely one of law, fit for immediate judicial resolution. Plaintiffs' claim is ripe for adjudication.

II. THE CSA IS INAPPLICABLE TO PLAINTIFFS' INTENDED STATE-REGULATED CULTIVATION OF INDUSTRIAL HEMP

Under the CSA, illegal marijuana does *not* include hemp stalk, fiber, sterilized seed or oil—the very commodities Rep. Monson and Wayne Hauge seek to produce in North Dakota. Under the CSA, "marihuana" is defined as "all parts of the plant *Cannabis Sativa L*," but the definition specifically excludes the stalk, fiber, sterilized seed and seed oil:

> The term "marihuana" means all 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 <u>does not include the mature stalks</u> of such [cannabis] plant, any other compound, manufacture, salt, derivative, mixture or preparation of such mature stalks (except the resin extracted therefrom), <u>fiber, oil or cake, or the sterilized seed of such plant</u>….

21 U.S.C. §802(16)(emphasis added). In fact, the express exclusion of hemp stalk, fiber, oil and sterilized seed was adopted by Congress more than 60 years ago in order to make clear that Congress' intention was only to regulate drug-cannabis and that it did not intend to interfere with the legitimate hemp industry.

The CSA's definition of "marihuana" was taken verbatim from the definition included in the Marihuana Tax Act of 1937, 50 Stat. 551, which imposed differential tax rates on industrial hemp and drug marijuana plants. *See generally, New Hampshire Hemp Council*, 203 F.3d at 7. The legislative history of the 1937 Act makes clear that Congress—in enacting this definition—was strongly committed to preserving the legitimate cultivation and processing of industrial hemp.

For example, at hearings before the Senate Finance Committee in July 1937, Clinton Hester, Assistant General Counsel for the Treasury Department, assured the Committee that, "[t]he production and sale of hemp and its products for industrial purposes will not be adversely affected by this bill." Hearings on H.R. 6906, 75th Cong., 1st Sess. 7 (July 12, 1937). Mr. Hester was then asked to explain the "legitimate uses…now made of the hemp plant in the United States." *Id*. at 19. Hester explained that seed was used for making meal and that the oil is "used in the manufacture of varnish and paint and soap and linoleum, and then in the case of the mature stalk the use of that for making fiber in fiber products. Of course they are entirely outside the bill." *Id*. at 20. The House Ways and Means Committee report on the bill explained that, "[t]he term 'marijuana' is defined so as to bring within its scope all parts of the plant having the harmful drug ingredient, but so as to exclude the parts of the plant and the valuable industrial articles produced therefrom in which the drug is not present." H. Rep. 792, 75th Cong. 1st Sess. 3-4 (1937(emphasis added).

In enacting the CSA in 1970, Congress adopted, in its entirety, the definition of "marihuana" from the Marihuana Tax Act of 1937. As explained in *New Hampshire Hemp Council*, however, the CSA imposed a broad criminal ban rather than a differential tax scheme, and, "[w]hile in 1937 Congress had indicated in legislative history that production for industrial uses would be protected,…we can find no indication that Congress in 1970 gave any thought to how its new statutory scheme would affect such production." 203 F.3d at 7.

In these murky circumstances, two propositions are well-established. First, hemp stalk, fiber, sterilized seed and oil remain entirely exempt from the CSA, notwithstanding that these parts of the hemp plant may contain trace non-psychoactive amounts of naturally-occurring THC. In *Hemp Industries Ass'n v. Drug Enforcement Administration*, 357 F.3d 1012 (9th Cir. 2004), the Court invalidated DEA regulations which would have banned the

manufacture and sale of edible products made from hemp seed and oil. The Court affirmed that hemp products (stalk, fiber, seed and oil) do *not* contain any controlled substance as defined by the CSA and that DEA's rule "improperly renders naturally-occurring non-psychoactive hemp illegal for the first time." 357 F.2d at 1017. The Court further held that:

> The non-psychoactive hemp in Appellants' [edible and personal care] products is derived from the 'mature stalks' or is 'oil and cake made from the seeds' of the Cannabis plant, and therefore fits within the plainly stated exception to the CSA definition of marijuana….. Congress knew what it was doing and <u>its intent to exclude non-psychoactive hemp from regulation is entirely clear</u>.

Id. at 1018 (emphasis added). Thus, it is clear that hemp stalk, fiber, non-viable seed and oil, and products of any and all kinds made from those commodities, have always been, and remain, entirely lawful under the CSA.

The second well-established proposition is that, at the same time that the hemp stalk, fiber, sterilized seed and oil remain entirely exempt from the CSA, the industrial hemp plant is technically of the same species—*Cannabis Sativa L*.—as that defined as "marihuana" under the CSA. To be sure, hemp plants legal under North Dakota law-- *i.e*., containing less than 3/10 of 1% THC, at all times in their growing cycle, are useless as drug marijuana because that is simply not enough THC to produce any psychoactive effect. S*ee* Leson Dec. ¶¶ 8-9. That fact, however, does not, in itself, exempt hemp plants from the CSA, <u>but only because hemp is the same species as marijuana</u>. That, of course, is the holding of the two cases on which the DEA principally relies, *United States v. White Plume*, 447 F.3d 1067 (8th Cir. 2006), and *New Hampshire Hemp Council*, *supra*.[2]

[2] In this regard, it should be noted that hemp plants are treated as "marihuana" under the CSA not, as White *Plume* suggests in dicta, because they contain a tiny amount of THC, 447 F.3d at 1073, but simply because they are technically of the same species, *Cannabis Sativa L*, and therefore fall within the "literal language" of the definition. *New Hampshire Hemp Council*, 203 F.3d at 8 In other words, even if the industrial hemp plants at issue here contained absolutely no THC, at all stages of their growth, the plants would still be controlled under the CSA as "marijuana." As *Hemp Industries Ass'n* makes clear, 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 or to marijuana

Neither of those cases, however, involved the cultivation of industrial hemp under state law, within a regime of state regulation in which conservatively strict non-psychoactive THC limits are enforced and none of the *Cannabis Sativa L* plant actually enters commerce of any kind, other than those parts explicitly exempted under federal law. For the following reasons, the CSA does not and cannot extend to cultivation of industrial hemp pursuant to such a state regulatory regime.

A. Congress Did Not Intend the CSA to Reach Intrastate Activity in Which Only Non-Regulated Parts of the Plant Enter Commerce

DEA, citing *White Plume*, argues that the plain language of the CSA includes all *Cannabis Sativa* plants regardless of their use or THC content. DEA Br. at 16-17. That is true, but it is not the end of the matter. "'If the plain language of the statute is unambiguous, that language is conclusive absent clear legislative intent to the contrary.'" *United States v. McAllister*, 225 F.3d 982, 986 (8th Cir. 2000), *quoting United States v. S.A.*, 129 F.3d 995, 998 (8th Cir. 1997)(emphasis added). "The primary objective of statutory construction is to determine legislative intent." *In re Prines*, 867 F.2d 478, 484 (8th Cir. 1989), citing *United States v. Jones*, 811 F.2d 444, 447 (8th Cir. 1987). "In carrying out this duty, we must consider the statute as a whole, interpreting language in one section of a statute consistently with language of other sections and with the purposes of the statute." *Prines,* 867 F.2d at 484. In this case, the plain language of Congress's own findings in the CSA clearly demonstrate

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derivatives like hashish or even hypothetical 100% pure natural THC refined from marijuana resin, which are all controlled as marijuana "derivatives" under "marihuana" not as "THC" in the CSA. 357 F.3d at 107. In this regard, it should be noted that *the New Hampshire Hemp Council* court expressed some skepticism that the industrial hemp plants at issue had no drug potential: "Owen's main argument is that plants produced for industrial products contain very little of the psychoactive substance THC. However, the low THC content is far from conclusive…..It may be that at some stage the plant destined for industrial products is useless to supply enough THC for psychoactive effects." The *White Plume* court similarly suggested that because "the entire marijuana plant which at some point contains psychoactive levels of THC, the CSA regulates the farming of hemp." These courts' concerns about the THC content of hemp are simply not well-founded. Industrial hemp varieties are generally not psychoactive, and certainly not when subject to strict regulatory controls that are in place in Canada and North Dakota that limit THC content to 0.3% at the point of maximal THC content. *See* Leson Dec. ¶¶8-9.

that Congress did not intend to preclude cultivation of non-drug industrial hemp under a state-regulated regime in which strict THC limits prevent diversion to drug use and in which only the *non*-regulated parts of the plant would enter commerce.

The specific congressional findings made about the need to regulate intrastate transactions in controlled substances are that:

> (3) ….Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution and possession, nonetheless have a substantial and direct effect upon interstate commerce because—
>
> (A) after manufacture, many controlled substances are transported in interstate commerce;
>
> (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution;
>
> (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession;
>
> (4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances;
>
> (5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus it is not feasible to distinguish in terms of controls between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate….”

21 U.S.C. §801(3), (4) & (5).

Not one of these findings applies to the in-state, state-regulated cultivation in which Plaintiffs seek to engage. In that activity, no non-exempted controlled substance part of the plant will enter either intrastate *or* interstate commerce, either before or after production, except for viable planting seed that enters only intrastate commerce and is not itself usable as a drug or to grow drug marijuana. Under North Dakota law and regulations, Rep. Monson and Mr. Hauge may grow industrial hemp on their farms but must harvest the hemp stalk, fiber, seed and oil from the plants and only those commodities may leave their farms. All

other parts of the plant itself must be destroyed or sold to a DEA-registered processor. N.D. Admin. Code §7-14-02-04(1). The state regulations thus ensure that no parts of the cultivated industrial hemp plants will leave the farm of either Plaintiff other than those parts exempt from federal law.

Specifically, after harvesting the industrial hemp plants, Rep. Monson and Mr. Hague will remove the seeds on the premises of their farm. Monson Aff.. ¶8, Hauge Aff. ¶7. Rep. Monson will use a commercial grade oil press on his own premises to press seed into oil, and ship the oil directly to customers. (*Id*. ¶9). The only parts of the hemp plant that could enter commerce at all, then, from Rep. Monson's cultivation of hemp, are the parts of the plant that Congress has specifically chosen *not* to regulate. Mr. Hauge plans to sell viable industrial hemp planting seed, after confirmation testing by the North Dakota Ag Commissioner ensuring THC levels in the parent plant flowers are below 0.3%, only to other state-licensed North Dakota industrial hemp farmers. Hauge Aff. ¶¶ 4, 5, 8. State regulations require such seed to be secured during transport. Hauge Aff. ¶¶ 5, 8. Therefore, the planting seed that will leave Mr. Hauge's farm will not enter interstate commerce because it will be sold in North Dakota only to other state-licensed North Dakota industrial hemp farmers. Hauge Aff. ¶ 9.

With respect to the viable planting seed Rep. Monson and Mr. Hauge must have in order to plant his crop in the first place, that seed will come from one of four sources: (i) under DEA-issued import license; (ii) from a DEA-licensed researcher possessing such seed; (iii) from feral seed stock certified by the North Dakota Agriculture Commissioner; or (iv) from feral seed collected from areas proximate to their farms. Monson Dec. ¶ 7, Hauge Aff. ¶ 6. These sources are either legal under federal law or do not implicate interstate commerce in any way, and are not a source of seed for plants that can in any way participate in the stream of commerce for drug marijuana.

Thus, no *Cannabis* plant, or any regulated part of the plant other than that seed (which will only move in intrastate commerce), will have been transported in, or flowed through, commerce of any kind. Thus, the Congressional finding in 21 U.S.C. §801(3) is inapplicable. For those same reasons, there is no possibility of local growing of industrial hemp, regulated by the state, contributing to increasing the interstate supply—"swelling the interstate traffic"—in the *controlled* parts of the plant. Thus, the Congressional finding in 21 U.S.C. §801(4) is inapplicable.

Finally, the only commercially useful parts of the plant distributed interstate hemp stalk, fiber, sterilized seed and oil—are not themselves controlled substances and therefore *can* be "differentiated from controlled substances manufactured and distributed interstate." 21. U.S.C. § 801(5). Moreover, viable non-drug hemp planting seed used for planting in North Dakota, under state regulation and tracking, can easily be differentiated from the viable drug-marijuana seed "distributed interstate" that is a controlled substance. Precisely because industrial hemp plants and flowers cannot be used as drug marijuana, *see* Leson Dec. ¶¶ 8-9, the former cannot be used to substitute for the latter. Fortenberry Aff. ¶¶17-20. The viable hemp seed traded within North Dakota could not be used to grow drug marijuana, inside or outside North Dakota. Therefore, it is indeed "feasible to distinguish in terms of controls" between controlled substances distributed interstate and the lawful hemp stalk, fiber, non-viable seed and oil manufactured and distributed in North Dakota, and the planting seed used in North Dakota. For that reason, the Congressional finding in 21 U.S.C. §801(5) is also inapplicable.

Congress's own findings, themselves part of the "plain language" of the CSA, demonstrate that Congress simply did not intend to preclude the kind of in-state cultivation of industrial hemp that is permitted by North Dakota law and in which Plaintiffs seek to engage.

In those circumstances, the CSA does not reach to that intrastate, state-sanctioned and state-regulated activity. In *Gonzales v Oregon*, 546 U.S. 243 (2006), the Court recognized that the CSA's chief purpose is to combat "recreational drug abuse." 546 U.S. at 271. The Court noted that the CSA itself provides that, "absent a positive conflict, none of the Act's provisions should be 'construed as indicating an intent'" to exclude state law. *Id*. at 270, citing the CSA, 21 U.S.C. §903. Here, industrial hemp is clearly not used or useable as a recreational drug, Leson Dec. ¶¶ 8-9, and, for the reasons set forth above, there is simply no "positive conflict" between the North Dakota law and the CSA as Congress intended it to be applied.

In *White Plume*, the Court had no occasion to address the situation of a state-regulated regime for cultivation of industrial hemp, in which strict regulatory controls that limit THC content are in place and no federally-regulated part of the plant would enter commerce as a result of that cultivation. Indeed, in that case, the American Indian tribe involved made no attempt to institute, through tribal law or otherwise, regulations that would monitor THC limit compliance or that would prevent interstate trade in viable seed or limit the application of the program to the production of exempt parts of the plant. The *White Plume* Court held that the "language of the CSA unambiguously bans the growing of marijuana, *regardless of its use*" and that "we find no evidence that Congress intended otherwise." 447 F.3d at 1072 (emphasis added). The Court did not rule—and had no occasion to rule—on whether the language of the CSA unambiguously bars the growing of *Cannabis* regardless of the means of its regulation and regardless of its actual affect on interstate commerce. By contrast with the situation in *White Plume*, there is indeed evidence here that "Congress intended otherwise"—that Congress did not intend that the CSA would reach purely intrastate state-licensed and regulated cultivation of non-drug hemp in which state law enforcement ensures that the hemp

cannot be diverted to drug use and in which only the non-regulated parts of the plant enter commerce.

B. The CSA Cannot Reasonably Be Interpreted to Exclude In-State Cultivation When There Is No Risk of Diversion

In the CSA, Congress has clearly decided to allow the non-regulated parts of the plant—hemp stalk, fiber, sterilized seed and oil-- to enter *foreign* commerce, that is, to be imported directly into the United States. *See e.g., Limbach v. Hoover & Allison Co*., 466 U.S. 353, 355 (1984)(hemp fibers not grown in the U.S. can be imported); *Hemp Indus. Ass'n v. DEA,* 333 F.3d 1081, 1085 n.2 (9th Cir. 2003)(hemp seeds and oil must be imported because the plant itself cannot be grown). It is lawful for North Dakota users of hemp stalk, fiber, non-viable seed and oil products to import those plant parts, for example, from Canada.

Why would Congress intend to allow someone in Canada to grow non-psychoactive *Cannabis* and export the non-regulated parts of the plant (hemp stalk, fiber, non-viable seed and oil) into North Dakota but *not* allow someone in North Dakota to grow the industrial hemp plant in order to produce these commodities for exactly the same purposes, within North Dakota? The answer is obvious: because allowing farmers to grow *Cannabis* plants in North Dakota in the absence of controls and regulations on THC content poses the risk of drug versus non-drug cannabis being grown that would result in diversion of the regulated parts of the plant, the flowering tops and leaves into interstate commerce, thereby increasing the supply of illegal marijuana.

Under North Dakota law and regulations, however, there is no risk of such diversion. State-enforced THC limits and monitoring ensure that non-drug hemp flowers that remain on the farm have no potential for drug use. No regulated part of the plant other than viable non-drug planting seed will ever leave the farmer's property and enter commerce at all. N.D.C.C.

§§ 4-41-01, 4-41-02, and N.D.Admin. Code, Article 7-14. And as noted, the intrastate trade in viable seed needed for planting does not create any risk of the diversion with which Congress was concerned, since the hemp planting seed, even if it did leave the state, would be completely useless either as a drug or to grow drug marijuana. *See* Leson Dec. ¶¶ 8-9.

In the absence of such risk, it makes no sense to interpret the law as forbidding farmers in North Dakota to grow a plant for purposes of processing its legal parts in the United States while allowing farmers in Canada to grow the same plant for the same purposes—namely, importing the legal parts into United States commerce and using those legal commodities to make various products for sale in the United States.

C. Extending the CSA to the Intrastate, State-Regulated Cultivation of Industrial Hemp in Which Plaintiffs Intend to Engage Would Exceed Congressional Power Under the Commerce Clause

To extend the CSA to the state-regulated activity permitted and regulated by North Dakota law and in which Plaintiffs intend to engage, would exceed Congress's power under the Commerce Clause of the Constitution of the United States. The relevant principle is that for intrastate activity in a commodity fungible (identical) with the interstate commodity Congress has chosen to regulate, "'[e]ven if [the] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it 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). Certainly, Congress could choose to regulate hemp stalk, fiber, non-viable seed and oil. But it has chosen <u>not</u> to do so. And so, Congress, having chosen *not* to regulate foreign or interstate commerce in that class of products, cannot constitutionally regulate <u>intrastate</u> state-regulated and licensed activity that results only in putting that <u>same</u> class of products into commerce, activity that

presents no possibility of drug marijuana flowers being diverted--the Congressional interest under the CSA.

Therein lays the critical distinction between this situation and that in the California medical marijuana case, *Gonzales v. Raich*, 545 U.S. 1 (2005), on which DEA principally relies, DEA Br. at 19-21, with respect to congressional authority to regulate intrastate cultivation of the *Cannabis* plant. *Raich* involved two California residents who 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 Plaintiffs 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 *Raich,* the Supreme Court, first, re-affirmed a general principle of Commerce Clause jurisprudence that Congress has the power to regulate intrastate activities in a fungible commodity that "substantially affect" interstate commerce in that particular commodity and that even a purely local activity, and even one that is not commercial by its nature, "may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." 545 U.S. at 17, *quoting Wickard v. Filburn*, 317 U.S. 111, 125 (1942). Moreover, although the actions of each individual alone may not exert a substantial effect on interstate commerce, when viewed in the aggregate, individual intrastate activities can combine to substantially impact interstate markets. *Id.* In fact, in adopting the CSA, Congress specifically found "[l]ocal distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances." *Id.* at 13 n. 20. The Court was also not persuaded by the Plaintiffs' attempt to distinguish their use as consumptive and

not commercial, stating "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id.* at 18. Thus, the Court upheld the CSA as applied to the *Raich* Plaintiffs, finding Congress had a rational basis upon which to conclude production of fungible marijuana for personal consumption could substantially impact interstate commerce in drug marijuana.

In reaching its holding, 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. 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:

> The similarities between this case and *Wickard* are striking. Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a <u>fungible commodity</u> for which there is an established, albeit illegal, interstate market. Just as the Agricultural Adjustment Act was designed "to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid

> surpluses …" and consequently control the market price, *id*., at 115, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets….. In *Wickar*d, 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(emphasis added)

By contrast, under the North Dakota statutory and regulatory regime, there is no possible "diversion of homegrown [instate] marijuana." No plant and no part of the plant regulated by the CSA will 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 <u>at all</u> by the CSA. There is no "federal interest in eliminating commercial transactions" in hemp stalk, fiber, non-viable seed and oil because Congress has already decided that there is no federal interest, in that Congress has made interstate and foreign commerce in those items entirely <u>legal</u>. 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 because there is no national market for viable hemp seeds, 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 Plaintiffs' farms, as the flowers have no potential as a drug and are not "fungible" with drug marijuana. Leson Dec. ¶¶8-9; Fortenberry Aff. ¶¶18-20.

Thus, the core reasoning of *Raich*—that the interstate marijuana market would exert an inevitable "draw" on and diversion of intrastate medical marijuana that would significantly impact the illicit interstate drug marijuana market--is simply inapplicable to the state-authorized and regulated non-psychoactive hemp cultivation in which Plaintiffs intend to engage. No part of the non-psychoactive hemp plant, including in particular the non-drug non-psychoactive flowers, is fungible with the interstate market in psychoactive drug marijuana flowers. There is no interstate "draw" at all that would induce any diversion of any unlawful substance from North Dakota into the interstate market, and thus no substantial impact on the interstate commerce in illicit drug marijuana. The only things of value in the intrastate market that could be "diverted" are legal unregulated hemp fiber and seed products; for viable non-drug hemp planting seed there is no interstate market.

DEA argues that, "[r]egardless of Congress' purpose, 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." DEA Br. at 23. But that is precisely the point: while Congress "may" choose to regulate whatever commodities in interstate commerce, Congress has deliberately and explicitly chosen not to regulate the interstate market for non-drug *Cannabis* fiber and seed commodities under the CSA. There is no link whatsoever, therefore, between Congress' desire to regulate anything and the intrastate cultivation of non-drug industrial hemp by Rep. Monson and Mr. Hauge under the regulatory regime enacted by North Dakota. For these reasons, DEA's attempt to extend the CSA to cover the in-state state-licensed and regulated cultivation of non-psychoactive industrial hemp in North Dakota would exceed Congress's power under the Commerce Clause.

CONCLUSION

For the reasons set forth above, based on the undisputed facts, Plaintiffs are entitled to a declaratory judgment that the federal Controlled Substances Act does not prohibit their intended cultivation of industrial hemp pursuant to North Dakota state law and under licenses issued by the State. Accordingly, Plaintiffs' motion for summary judgment should be granted.

Dated this 19th day of September, 2007.

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