UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA

DAVID MONSON and WAYNE HAUGE, Plaintiffs, v. DRUG ENFORCEMENT ADMINISTRATION and UNITED STATES DEPARTMENT OF JUSTICE, Defendants.	)	**DEFENDANTS' MOTION TO DISMISS** Civil File No. 4:07-cv-00042 (DLH/CSM)

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), the U.S. Drug Enforcement Administration and the U.S. Department of Justice ("Defendants") hereby move this Court to dismiss Plaintiffs' Complaint. A brief in support of this motion and a statement of material facts are submitted herewith. Defendants respectfully request oral argument.

Respectfully submitted,

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Dated: August 20, 2007

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2007, a true and accurate copy of the foregoing document, Defendants' Motion to Dismiss, was filed electronically with the Clerk of Court through ECF and that ECF will send a Notice of Electronic Filing to the following:

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Dated: August 20, 2007

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UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA

DAVID MONSON and WAYNE HAUGE, Plaintiffs, v. DRUG ENFORCEMENT ADMINISTRATION and UNITED STATES DEPARTMENT OF JUSTICE, Defendants.	)	**DEFENDANTS' STATEMENT OF MATERIAL FACTS NOT IN DISPUTE** Civil File No. 4:07-cv-00042 (DLH/CSM)

Pursuant to Local Rule 7.1(B), the U.S. Drug Enforcement Administration and the U.S. Department of Justice ("Defendants") submit this statement of material facts which are not in dispute.

1. The Controlled Substances Act ("CSA") defines "marihuana" (or marijuana) as "all parts of the plant *Cannabis sativa L.*, whether growing or not . . . ." 21 U.S.C. § 802(16). Under the CSA, marijuana is a schedule I controlled substance, *id.* § 812 (schedule I)(c)(10), and "any material . . . which contains any quantity of . . . [t]etrahydrocannabinol[]" is a schedule I controlled substance, *id.* § 812 (schedule I)(c)(17).

2. Any manufacturer of a schedule I controlled substance must apply for and obtain a registration from the Drug Enforcement Administration ("DEA"). *Id.* §§ 822-23. Planting, cultivating, growing, or harvesting a controlled substance falls within the CSA definition of "manufacture." *Id.* §§ 802(15), (22).

3. Plaintiffs David Monson and Wayne Hauge are North Dakota farmers who seek to grow the *Cannabis sativa L.* plant for industrial purposes. The plants Plaintiffs seek to grow

will contain THC. Plaintiffs assert that these plants will contain no more than three-tenths of one percent THC.

4. On or about February 1, 2007, the DEA informed Plaintiffs, through the Commissioner of the North Dakota Department of Agriculture, that the CSA "defines marihuana without distinction based on THC content" and that anyone seeking to grow any *Cannabis sativa L.* plant must apply for and obtain a DEA registration before planting a *Cannabis sativa L.* crop.

5. On or about February 12, 2007, Plaintiffs submitted registration applications to the DEA. The DEA is currently processing those applications. On June 1, 2007, it published notice of Plaintiffs' applications in the *Federal Register*. On June 15, 2007, it sent letters to both Plaintiffs seeking additional information about their intended cultivation of *Cannabis sativa L.* The DEA has not yet completed its review of Plaintiffs' applications.

6. Plaintiffs filed their Complaint in this case on June 18, 2007.

Respectfully submitted,

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Dated: August 20, 2007

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2007, a true and accurate copy of the foregoing document, Defendants' Statement of Material Facts Not in Dispute, was filed electronically with the Clerk of Court through ECF and that ECF will send a Notice of Electronic Filing to the following:

Timothy Q. Purdon tpurdon@vogellaw.com
Joseph E. Sandler sandler@sandlerreiff.com

Dated: August 20, 2007

s/ Wendy M. Ertmer
WENDY M. ERTMER

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DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

Plaintiffs are two North Dakota farmers who seek to grow the *Cannabis sativa L.* plant ("*Cannabis*" or "marijuana") for industrial purposes. The Controlled Substances Act ("CSA") requires any person who manufactures a controlled substance to obtain a certificate of registration from the Drug Enforcement Administration ("DEA"). Because the *Cannabis* plant is a controlled substance under the CSA, Plaintiffs have applied for DEA certificates of registration. Instead of allowing the DEA to complete its review of those applications, however, Plaintiffs filed this lawsuit. They claim that the DEA has misconstrued the CSA by requiring industrial growers of the *Cannabis* plant to obtain DEA registrations at all, and they seek a declaratory judgment that their intended growth of marijuana without a DEA registration is lawful.

Plaintiffs' claims suffer from numerous jurisdictional defects, including that the federal courts of appeals have exclusive original jurisdiction over challenges to DEA administrative actions under the CSA, 21 U.S.C. § 877; that Plaintiffs lack standing to challenge the DEA's interpretation of the CSA because they have suffered no cognizable injury; and that their claims are not yet ripe for review.

Apart from these jurisdictional defects, Plaintiffs' claims fail on the merits under directly applicable Eighth Circuit and Supreme Court precedent. Plaintiffs contend that the *Cannabis* plants they seek to grow (which they refer to as "hemp") will contain a relatively low concentration of the primary psychoactive chemical constituent, tetrahydrocannabinol ("THC"), and that these plants are therefore not controlled substances under the CSA. The same argument, however, was rejected by the Eighth Circuit in *United States v. White Plume*, which held that

"the CSA does not distinguish between marijuana and hemp" and that "any material which contains *any quantity* of THC" is a controlled substance under the CSA. 447 F.3d 1067, 1073 (8th Cir. 2006) (emphasis in original) (quotations and alterations omitted). The court therefore held that the CSA regulates the growth of *Cannabis* for industrial purposes. *Id.*

Alternatively, Plaintiffs argue that the CSA, as interpreted by the DEA, exceeds Congress' authority under the Commerce Clause because the *Cannabis* Plaintiffs seek to grow will not enter interstate commerce. This argument, however, was rejected by the Supreme Court in *Gonzales v. Raich*, which held that Congress may regulate the growth of *Cannabis* that will never enter interstate commerce. 545 U.S. 1, 22 (2005).

In sum, whether on the basis of threshold jurisdictional defects under Federal Rule of Civil Procedure 12(b)(1), or because they have failed to state a claim under Rule 12(b)(6), Plaintiffs' lawsuit must be dismissed.

BACKGROUND

I. THE CONTROLLED SUBSTANCES ACT

The Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq.*, establishes a comprehensive federal scheme to regulate controlled substances. The CSA makes it unlawful to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" any controlled substance, "[e]xcept as authorized by [21 U.S.C. §§ 801-904]." *Id.* § 841(a)(1). Under the CSA, "manufactur[ing]" includes "production," *id.* § 802(15), which includes "planting, cultivation, growing, or harvesting" a controlled substance, *id.* § 802(22). The CSA similarly makes it a crime to possess any controlled substance except as authorized by the Act. *Id.* § 844(a).

The CSA thus establishes "a 'closed' system of drug distribution for legitimate handlers" of controlled substances. H.R. Rep. No. 91-1444, pt. 1, at 6 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4566, 4571-72. To effectuate that closed system, the CSA "authorizes transactions within 'the legitimate distribution chain' and makes all others illegal." *United States v. Moore*, 423 U.S. 122, 141 (1975) (quoting H.R. Rep. No. 91-1444, pt. 1, at 3 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4566, 4569).

The restrictions the CSA places on the manufacture, distribution, and possession of a controlled substance depend upon the schedule in which the drug has been placed. *See* 21 U.S.C. §§ 821-29. Since Congress enacted the CSA in 1970, "marijuana" (or "marihuana") and tetrahydrocannabinols have been classified as schedule I controlled substances. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 202, 84 Stat. 1249 (schedule I(c)(10), (17)); 21 U.S.C. § 812(c) (schedule I(c)(10), (17)). "Marijuana" is defined under the CSA to include "all parts of the plant Cannabis sativa L." except certain components of the plant such as mature stalks, fiber produced from the stalks, sterilized seeds, and oil from the seeds. 21 U.S.C. § 802(16).

A controlled substance is listed in schedule I, the most restrictive schedule, if it has "a high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use . . . under medical supervision." *Id.* § 812(b)(1). Under the CSA, any person who seeks to manufacture, distribute, or possess a schedule I controlled substance must apply for and obtain a certificate of registration from the DEA. *Id.* §§ 822-23. When evaluating an application to manufacture a schedule I substance, the DEA is required to

consider such factors as the applicant's "maintenance of effective controls against diversion," "past experience in the manufacture of controlled substances," and criminal history. *Id.* § 823(a).

The CSA contains congressional findings regarding the effects of drug distribution and use on the public health and welfare and the effects of intrastate drug activity on interstate commerce. Congress found that "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." *Id.* § 801(2). Congress then found:

> A major portion of the traffic in controlled substances flows through interstate and foreign commerce. 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, and
>
> (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

Id. § 801(3). Congress further found that "[l]ocal distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances," *id.* § 801(4); that "[c]ontrolled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate" and "[t]hus, it is not feasible to distinguish" between such substances "in terms of controls," *id.* § 801(5); and that "[f]ederal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic," *id.* § 801(6).

II. PLAINTIFFS' INTENDED GROWTH OF MARIJUANA[1]

Plaintiffs David Monson and Wayne Hauge are North Dakota farmers. Compl. ¶¶ 10-11. Plaintiff Monson is also a member of the House of Representatives of the North Dakota Legislative Assembly. *Id.* ¶ 10. In 1999, the Legislative Assembly passed a bill, introduced by Plaintiff Monson and others, legalizing the growth, possession, and sale of "industrial hemp" under North Dakota law. *See* H.R. 1428, 56th Leg. Assem. (N.D. 1999); *see also* N.D. Cent. Code § 4-41-01. The statute defines "industrial hemp" as any *Cannabis* plant "having no more than three-tenths of one percent tetrahydrocannabinol [THC]," N.D. Cent. Code § 4-41-01, which is the primary psychoactive chemical constituent of the *Cannabis* plant, 66 Fed. Reg. 20,038, 20,041 (Apr. 18, 2001). Contrary to the CSA, then, the North Dakota statute regulates *Cannabis* based on THC concentration.

In December 2006, the North Dakota Department of Agriculture ("NDDA") finalized regulations governing the growth of "industrial hemp" pursuant to the new statute. *See* N.D. Admin. Code 7-14-01-01 to 7-14-02-09. Recognizing that "industrial hemp" is regulated under federal law as "marijuana," a schedule I controlled substance, the NDDA regulations originally provided that any person seeking to grow "industrial hemp" must, in addition to complying with North Dakota regulations, obtain a certificate of registration from the DEA. *Id.* 7-14-02-04(2), (3). On December 26, 2006, however, the Commissioner of the NDDA asked the DEA to waive its registration requirement for all farmers seeking to grow *Cannabis* pursuant to the new North

[1] The documents referenced in this Section and attached hereto represent a portion of the correspondence that forms the factual basis of Plaintiffs' Complaint. "When deciding a motion to dismiss, a court may consider the complaint and documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *Kushner v. Beverly Enters., Inc.*, 317 F.3d 820, 831 (8th Cir. 2003) (quotations omitted).

Dakota law. *See* Letter from Roger Johnson, NDDA, to Karen Tandy, DEA (Dec. 26, 2006) at 1, attached as Ex. A. In essence, the Commissioner asked the federal government to forego all regulation of marijuana that meets North Dakota's definition of "industrial hemp."

The DEA denied the Commissioner's request: "Congress expressly commanded the United States Department of Justice to take the lead in controlling licit and illicit drug activity through enforcement of the CSA. . . . [F]or DEA to simply turn over to any state the agency's authority and responsibility to enforce the CSA . . . would be directly at odds with the Act." Letter from Joseph T. Rannazzisi, DEA, to Roger Johnson, NDDA (Feb. 1, 2007) at 2-3, attached as Ex. B. The DEA also reiterated that, because "[f]ederal law uses the terms 'marihuana' and 'cannabis' and defines marihuana without distinction based on THC content," the CSA requires a DEA registration for the cultivation of marijuana for industrial purposes, regardless of the THC content.[2] *Id.* at 2 n.4.

On or about February 12, 2007, the NDDA submitted registration applications on behalf of Plaintiffs Monson and Hauge and, on March 5, 2007, demanded resolution of those applications by April 1, 2007. Letter from Roger Johnson, NDDA, to Karen Tandy, DEA (Mar. 5, 2007) at 1, 4, attached as Ex. C. The DEA responded that registration applications require substantial time to process, as they require a notice of application in the *Federal Register*, a

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[2] The DEA had previously determined that any *Cannabis sativa L.* plant, regardless of its THC concentration, is "marijuana" within the meaning of the CSA:

> As to respondent's assertion that the substance that it intends to be involved with is a "non-drug" due to its low concentration of THC, the Acting Deputy Administrator concludes that the statutory definition of marijuana does not address the degree of THC concentration. Therefore, regardless of the level of THC concentration of the plants, Respondent's proposed activities fall within the statutory definitions of the manufacture of marijuana.

Hemp Prods. Research Co., 63 Fed. Reg. 260, 261 (Jan. 5, 1998). The DEA concluded that the prospective manufacturer was required to obtain a DEA registration. *Id.* (citing 21 U.S.C. § 822(a)).

sixty-day response period for comments, a background investigation of the applicant, and an on-site investigation of the manufacturing facilities. Letter from Joseph T. Rannazzisi, DEA, to Roger Johnson, NDDA (Mar. 27, 2007) at 1-2, attached as Ex. D. The DEA informed the NDDA that a decision within seven weeks, as the NDDA had requested, was unrealistic. *Id.* at 2. In response, the North Dakota Legislative Assembly struck the DEA registration requirement from its "industrial hemp" law. The revised statute provides that "[a] license required by this section is not conditioned on or subject to review or approval by the United States drug enforcement agency [*sic*]." 2007 N.D. Laws Ch. 20.

The DEA continues to process Plaintiffs' registration applications. On June 1, 2007, it published notice of Plaintiffs' applications in the *Federal Register*. 72 Fed. Reg. 30,632 (June 1, 2007). On June 15, 2007, it sent letters to both Plaintiffs seeking additional information about their intended cultivation of marijuana. *See* Letters from Gary G. Olenkiewicz, DEA, to Wayne L. Hauge and David C. Monson (June 15, 2007), both attached as Ex. E. Neither Plaintiff responded. Instead, Plaintiffs filed this lawsuit, claiming that the DEA has misconstrued the CSA by requiring persons who seek to grow marijuana for industrial purposes to obtain DEA registrations.

STANDARD OF REVIEW

Actions are subject to dismissal when the court lacks subject matter jurisdiction over the claims, Fed. R. Civ. P. 12(b)(1), or when a party fails to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6). A motion to dismiss pursuant to Rule 12(b)(1) may challenge the complaint either on its face or on the factual truthfulness of its averments. *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). In reviewing a motion to dismiss pursuant to Rule 12(b)(6),

however, the court accepts the facts alleged in the complaint as true and dismisses the action when the allegations in the complaint cannot raise a claim of entitlement to relief. *Bell Atl. Corp. v. Twombly*, -- U.S. --, 127 S.Ct. 1955, 1965-66 (2007).

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER PLAINTIFFS' CLAIMS.

A. District Courts Lack Subject Matter Jurisdiction Over DEA Determinations Under the CSA.

Under the Administrative Procedure Act ("APA"), only "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."[3] 5 U.S.C. § 704. The CSA makes reviewable certain actions of the DEA, but only in the courts of appeals:

> [A]ny person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located upon petition filed with the court and delivered to the Attorney General within thirty days after notice of the decision.

21 U.S.C. § 877. "Section 877 . . . seems to explicitly vest *exclusive* jurisdiction in the courts of appeals over any CSA-based agency determination that could properly be before a federal court." *Doe v. Gonzalez [sic]*, No. 06-966, 2006 WL 1805685, at *22 (D.D.C. June 29, 2006), *aff'd sub nom. Doe v. Drug Enforcement Admin.*, 484 F.3d 561 (D.C. Cir. 2007) (emphasis added).

The exclusive jurisdiction of the courts of appeals over disputes like this one is well-established. *See Doe*, 484 F.3d at 568-69 (court of appeals had exclusive jurisdiction over

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[3] Plaintiffs cite the Declaratory Judgment Act, 28 U.S.C. § 2201, in conjunction with the general federal question statute, 28 U.S.C. § 1331, as the jurisdictional basis of their Complaint. Compl. ¶ 8. The Declaratory Judgment Act, however, does not create an action but merely provides an additional remedy. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); *Victor Foods, Inc. v. Crossroads Econ. Dev. of St. Charles County, Inc.*, 977 F.2d 1224, 1227 (8th Cir. 1992). Plaintiffs therefore must be relying on the APA, in conjunction with 28 U.S.C. § 1331, as the putative jurisdictional basis of their challenge to the agency's application of the CSA.

statutory and constitutional challenge to DEA denial of controlled substances import permit); *Oregon v. Ashcroft*, 368 F.3d 1118, 1120 & n.1 (9th Cir. 2004) (court of appeals had exclusive jurisdiction over challenge to interpretive rule issued by Attorney General pursuant to CSA), *aff'd sub nom. Gonzales v. Oregon*, 546 U.S. 243 (2006); *Hemp Indus. Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1084-85 (9th Cir. 2003) (court of appeals had original jurisdiction over challenge to legislative rule issued by Attorney General pursuant to CSA); *Steckman v. Drug Enforcement Admin.*, No. Civ. A. H-97-1334, 1997 WL 588871, at *1-2 (S.D. Tex. Sept. 16, 1997) (district court lacked jurisdiction over CSA claim because court of appeals had exclusive jurisdiction: "When Congress has prescribed a particular method of review, that procedure is exclusive even if the statutory scheme does not explicitly describe itself as the 'exclusive' method of review.").

Because § 877 vests exclusive jurisdiction in the courts of appeals over any CSA-based agency determination that could be brought in federal court, this Court does not have jurisdiction over Plaintiffs' claims. Although Defendants do not concede that any DEA determination relevant to this case constitutes a "final decision" for purposes of conferring jurisdiction in the circuit courts under § 877, this Court need not decide that question. If the challenged decision is not "final," Plaintiffs may not bring an action in *any* court. *See, e.g.*, *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 13 (D.C. Cir. 2005) ("[A]n agency action must be *final* in order to be judicially reviewable.") (emphasis added); *see also* 5 U.S.C. § 704 (conferring jurisdiction only over "final agency action"); 21 U.S.C. § 877 (conferring jurisdiction only over "final decision[s]"). If the determination is "final," then the courts of appeals have exclusive

jurisdiction under § 877. Plaintiffs therefore cannot maintain their lawsuit in this or any other district court.

In addition, assuming *arguendo* that the DEA has made a final decision, the thirty-day time period for challenging that decision in the courts of appeals has lapsed. *See* 21 U.S.C. § 877 (30-day limitation for challenging DEA determinations). The DEA sent letters on February 1, 2007, and March 27, 2007, instructing the Commissioner that these two Plaintiffs must apply for certificates of registration. *See* Ex. B; Ex. D. To the extent the DEA has made any determination with respect to Plaintiffs, these letters reflect that determination.[4] Because Plaintiffs did not file their Complaint until June 18, 2007, the thirty-day period for filing a petition in a court of appeals challenging that "decision" has lapsed. *See Nutt v. Drug Enforcement Admin.*, 916 F.2d 202, 205 (5th Cir. 1990) (dismissing challenge to DEA denial of certificate of registration because lawsuit was untimely filed in court of appeals).

B. Plaintiffs' Claims Are Non-Justiciable.

"[A] lawsuit in federal court is not . . . an arena for public-policy debates." *Mausolf v. Babbitt*, 85 F.3d 1295, 1301 (8th Cir. 1996). Instead, "Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'" *Allen v. Wright*, 468 U.S. 737, 750 (1984). From this "bedrock requirement," *Valley Forge Christian Coll. v. Americans United for the Separation of Church & State*, 454 U.S. 464, 471 (1982), flow several doctrines – including standing and ripeness – which "state fundamental limits on federal judicial power in our system of government," *Allen*, 468 U.S. at 750.

[4] It is evident from these letters that they do not constitute "final decision[s]" by the DEA but instead reflect the DEA's deliberative evaluation of Plaintiffs' applications, consistent with its obligations under the CSA. *See* Ex. D (detailing DEA's application review procedures). The letters the DEA sent to Plaintiffs on June 15, 2007, asking a series of particularized questions related to their applications, further reflects the ongoing nature of the DEA's deliberative process. *See* Ex. E.

1. *Plaintiffs Lack Standing to Pursue Their Claims.*

To establish standing, a plaintiff must demonstrate that he has suffered an "injury in fact" – "an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Plaintiffs' pre-enforcement challenge to the DEA's construction of the CSA fails to meet this standard. Plaintiffs have been neither subjected to prosecution nor threatened with prosecution. Nor are they in any imminent danger of prosecution – they have neither violated, nor expressed any intent to violate, the CSA. *See San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1127 (9th Cir. 1996) (no standing for pre-enforcement challenge when "[t]he complaint does not specify any particular time or date on which plaintiffs intend to violate the Act"); *see also Lujan*, 504 U.S. at 564 ("Such 'some day' intentions – without any description of concrete plans, or indeed even any specification of *when* the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require.") (emphasis in original).

To support their pre-enforcement challenge, Plaintiffs will undoubtedly assert that they are "injured" because they must choose either to violate the law and risk enforcement or to forego their growth of *Cannabis* while the DEA considers their registration applications. Plaintiffs will claim, in other words, that the DEA has "chilled" their growth of marijuana. "Allegations of a subjective chill[, however,] are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; the federal courts . . . do not render advisory opinions." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) (quotations omitted). While courts recognize that the "chilling" effect of an allegedly invalid criminal statute may

constitute an exception to the general rule that a plaintiff must demonstrate a specific and imminent threat of prosecution, they limit this exception to the First Amendment context. *See, e.g.*, *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 294 (6th Cir. 1997) ("Except for cases involving core First Amendment rights, the existence of a chilling effect has never been considered a sufficient basis, in and of itself, for prohibiting government action.") (quotations and alterations omitted). The Eighth Circuit likewise distinguishes non-First Amendment standing cases on the basis that the "chilling" effect of an allegedly invalid statute is relevant only in the First Amendment context. *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 487 (8th Cir. 2006). Because Plaintiffs have not asserted a violation of a First Amendment right or of any other constitutional right, that they may be "chilled" from entering the *Cannabis* industry while the DEA considers their registration applications is of no moment.

In short, Plaintiffs seek an advisory opinion that an activity in which they wish to engage is not illegal. Their pre-enforcement, pre-injury challenge, however, is simply a "public-policy debate[]" about the wisdom of federal regulation of marijuana, *Mausolf*, 85 F.3d at 1301, and a "generalized grievance[], pervasively shared and most appropriately addressed in the representative branches," *Valley Forge Christian Coll.*, 454 U.S. at 475 (quotations omitted). Not surprisingly, CSA "injuries" comparable to those Plaintiffs assert here have been held non-cognizable. *Gettman v. Drug Enforcement Admin.*, 290 F.3d 430, 434 (D.C. Cir. 2002) (putative marijuana researcher had no standing to challenge DEA's decision not to reschedule marijuana); *see also United States v. White Plume*, No. 03-1074, 88 Fed. Appx. 973, at *1 (8th Cir. Feb. 27, 2004) (putative "hemp" producer had no standing to challenge DEA's regulation of "hemp"). For these reasons, Plaintiffs have no standing to pursue their claims in federal court.

2. *Plaintiffs' Claims Are Not Ripe for Adjudication.*

Ripeness is a justiciability doctrine designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Determining whether administrative action is ripe for judicial review requires courts to evaluate (1) the fitness of the issues for judicial decision; and (2) the hardship to the parties of withholding court consideration. *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003); *see also Abbott Laboratories*, 387 U.S. at 153; *Minn. Citizens Concerned for Life v. Fed. Election Comm'n*, 113 F.3d 129, 132 (8th Cir. 1997). "Sufficient hardship" may be found if the agency action "imposes costly, self-executing compliance burdens or if it chills protected First Amendment activity." *Minn. Citizens Concerned for Life*, 113 F.3d at 132.

Plaintiffs cannot demonstrate any hardship justifying judicial review prior to the DEA's resolution of their registration applications. Plaintiffs' only imminent "compliance burden[]" is the DEA registration requirement and the concomitant delay to their entry into the *Cannabis* industry. Plaintiffs have sought permission from North Dakota to grow *Cannabis* for nearly a decade. Additional delay pending DEA review of their registration applications is not the type of hardship that entitles them to an advisory opinion regarding the legality of their intended conduct. "At this stage, the only hardship compliance entail[s] is administrative inconvenience."

Mo. Pac. Employes' [sic] Hosp. Ass'n v. Donovan, 576 F. Supp. 208, 212 (E.D. Mo. 1983) (holding claims not ripe for judicial review), *aff'd*, 745 F.2d 1174 (8th Cir. 1984).

If, as Plaintiffs speculate, the DEA denies their registration applications, Plaintiffs may seek judicial review of that denial and, in that forum, may challenge the DEA's authority to require a certificate of registration. 21 U.S.C. § 877; *see also Doe*, 484 F.3d at 570-73 (accepting jurisdiction under § 877 and considering statutory and constitutional challenges to DEA denial of controlled substances import permit). In *Toilet Goods Association v. Gardner*, the Supreme Court held that when "only minimal, if any, adverse consequences will face [the plaintiffs] if they challenge the regulation" through an established administrative process initiated by the plaintiffs' non-compliance, it is "wiser to require them to exhaust this administrative process through which the factual basis . . . will certainly be aired and where more light may be thrown on the Commissioner's statutory authority and practical justifications" for the determination. 387 U.S. 158, 166 (1967). "Judicial review will then be available, and a court at that juncture will be in a better position to deal with the question of statutory authority." *Id.* Here, Plaintiffs need not even risk non-compliance, as in *Toilet Goods Association*, to avail themselves of the prescribed administrative process that could culminate in an opportunity for judicial review of the DEA's statutory authority to require *Cannabis* growers to register. As in *Toilet Goods Association*, a court reviewing the denial of Plaintiffs' registration applications will be in a better position to address Plaintiffs' challenge to the DEA's determination that registration is required under the CSA.

In short, until the DEA resolves Plaintiffs' registration applications, the "minimal . . . adverse consequences" that withholding review at this time may impose, *id.*, do not entitle Plaintiffs to the discretionary remedy of pre-injury review.[5]

II. THE *CANNABIS SATIVA L.* PLANT IS A CONTROLLED SUBSTANCE UNDER THE CSA.

This lawsuit is easily dismissed on the merits. Plaintiffs argue that any *Cannabis* plant that falls within the definition of "industrial hemp" under the North Dakota statute is not a controlled substance under the CSA and, consequently, that anyone seeking to grow such *Cannabis* plants need not obtain a DEA registration. *See* Compl. ¶ 7 (seeking declaration that "the CSA does not apply to the industrial hemp plants they seek to cultivate pursuant to state law"). As recently confirmed by the Eighth Circuit, however, the CSA unambiguously designates the *Cannabis* plant a controlled substance and therefore prohibits growth of that plant without a DEA registration.

A. The CSA Unambiguously Regulates the *Cannabis Sativa L.* Plant as a Schedule I Controlled Substance.

The starting point for any dispute over the meaning of a statute is the language of the statute itself. *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 5 (1985). "When the terms of a statute are unambiguous, judicial inquiry is complete." *United States v. Vig*, 167 F.3d 443, 448 (8th Cir. 1999). In such instances, "legislative history and policy arguments are at best interesting, at worst distracting and misleading, and in neither case authoritative." *N. States*

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[5] The First Circuit, before rejecting claims nearly identical to Plaintiffs' claims in this case, held that a prospective *Cannabis* grower's claims were ripe for review even though he had not applied for a DEA registration. *N.H. Hemp Council v. Marshall*, 203 F.3d 1, 5-6 (1st Cir. 2000). The Court did not, however, consider the ripeness of his claims in terms of the hardship that compliance would entail. *See id.* In the context of a pre-enforcement challenge to agency action, the Eighth Circuit's ripeness jurisprudence requires just that analysis. *See, e.g., Minn. Citizens Concerned for Life*, 113 F.3d at 132.

Power Co. v. United States, 73 F.3d 764, 766 (8th Cir. 1996). "We ask not what the Congress means; we ask only what the statute means." *United States v. Hepp*, 656 F.2d 350, 353 (8th Cir. 1981). These principles control the statutory construction question presented in this case.

Under the CSA, marijuana is designated a schedule I controlled substance. 21 U.S.C. § 812 (Schedule I)(c)(10). The CSA defines "marijuana" 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, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

Id. § 802(16). This definition unambiguously includes the *Cannabis sativa L.* plant and in no way differentiates between *Cannabis* plants based on their THC concentrations. While the definition does exclude certain *components* of the plant, a growing *Cannabis* plant plainly falls within the definition.

In addition, the CSA designates "any material . . . which contains *any quantity* of . . . [t]etrahydrocannabinol[] [THC]" a schedule I controlled substance. *Id.* § 812 (Schedule I)(c)(17) (emphasis added); *see also id.* § 881(g)(1) ("All species of plants from which controlled substances in schedules I and II may be derived which have been planted or cultivated in violation of this subchapter . . . may be seized and summarily forfeited to the United States.").

Plaintiffs concede that the plant they seek to grow is *Cannabis sativa L.* Compl. ¶ 2. Plaintiffs also concede that the plant they seek to grow will contain some quantity of THC. *Id.* ¶ 14. Whether viewed as marijuana, 21 U.S.C. § 812 (schedule I)(c)(10), or as THC-containing material, *id.* § 812 (schedule I)(c)(17), the plant Plaintiffs seek to grow is a schedule I controlled

substance under the plain language of the CSA. As such, it may not be produced without a certificate of registration from the DEA. *Id.* §§ 822-23.

B. Under Controlling Eighth Circuit Precedent, *Cannabis Sativa L.* Grown for Industrial Purposes is a Schedule I Controlled Substance Under the CSA.

In a recent case identical in all relevant respects to this one, the Eighth Circuit held that the CSA designates the *Cannabis sativa L.* plant, including that grown exclusively for industrial purposes, a schedule I controlled substance. *United States v. White Plume*, 447 F.3d 1067, 1070-73 (8th Cir. 2006).

In 1998, the Tribe Council of the Oglala Sioux Tribe passed an ordinance permitting the growth of "industrial hemp." *Id.* at 1069. The ordinance defined "industrial hemp" as "all parts and varieties of the plant *Cannabis sativa* . . . that are . . . cultivated and harvested for fiber and seeds and contain a [THC] concentration of one percent or less by weight." *Id.* (alterations omitted). Alex White Plume raised a *Cannabis* crop on federal trust land without a DEA registration. *Id.* The government sent him a DEA registration application, which he never completed. *Id.* at 1070. Instead of prosecuting, the government sought a declaratory judgment that the *Cannabis* plants White Plume cultivated were controlled substances under the CSA and sought to permanently enjoin him from growing such plants. *See id.*

White Plume argued, as Plaintiffs argue here, that the "industrial hemp" he grew was not "marijuana" within the meaning of the CSA. *Id.* The Eighth Circuit rejected this argument: "The language of the CSA unambiguously bans the growing of marijuana, regardless of its use." *Id.* at 1072. White Plume further argued, like Plaintiffs, that "industrial hemp" is not marijuana because it contains virtually no THC, making it incapable of having a high potential for abuse as required by the CSA for a drug in schedule I. *Id.* at 1072-73. The Eighth Circuit also rejected

this argument: "[T]he CSA does not distinguish between marijuana and hemp in its regulation." *Id.* at 1073. The court further explained that "Schedule I(c) includes any material which contains *any quantity* of THC" and a growing *Cannabis* plant is therefore a schedule I controlled substance. *Id.* (emphasis in original) (quotations and alterations omitted). Finally, the court considered the legislative history of the CSA but found "no evidence that Congress intended otherwise" than to ban the growth of all varieties of the *Cannabis* plant without a DEA registration. *Id.* at 1072.

The only other federal courts that have squarely considered this issue agree that *Cannabis* plants grown for industrial purposes and containing lower THC concentrations are "marijuana" within the meaning of the CSA. *N.H. Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 6 (1st Cir. 2000); *Kiczenski v. Ashcroft*, No. CIVS032305MCEGGHPS, 2006 WL 463153, at *3 (E.D. Cal. Feb. 24, 2006), *aff'd sub nom. Kiczenski v. Gonzales*, No. 06-15709, 2007 WL 1493801 (9th Cir. May 16, 2007). Another has stated as much in dictum. *Hemp Indus. Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1085 n.2 (9th Cir. 2003) ("The industrial hemp plant itself, *which falls under the definition of marijuana*, may not be grown in the United States. Therefore, the seeds and oil must be imported.") (emphasis added).

Other courts have held in the context of sentencing that *Cannabis* plants are "marijuana" regardless of their THC concentration. *United States v. Curtis*, 965 F.2d 610, 616 (8th Cir. 1992) (holding that male marijuana plants, which may have lower THC concentrations than female plants, are still marijuana plants for sentencing purposes); *United States v. Traynor*, 990 F.2d 1153, 1160 (9th Cir. 1993) (same), *overruled on other grounds by United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001); *United States v. Proyect*, 989 F.2d 84, 87-88 (2d Cir. 1993) (same and

noting "the simple concept that 'a plant is a plant is a plant'"); *United States v. Coslet*, 987 F.2d 1493, 1496 (10th Cir. 1993) ("[T]he presence of THC is not required for a plant to be considered a marijuana plant."); *see also United States v. Spann*, 515 F.2d 579, 583-84 (10th Cir. 1975) ("Congress has in effect determined that possession of some quantity of 'marihuana,' regardless of its particular hallucinogenic qualities, is proscribed."); *United States v. Northrop*, 972 F. Supp. 183, 185 (W.D.N.Y. 1997) ("The presence of THC is not required for a plant to be considered marihuana under 21 U.S.C. § 802(16).").

Under Eighth Circuit precedent, all varieties of the *Cannabis sativa L.* plant, regardless of their THC content and regardless of their use, are schedule I controlled substances under the CSA. That a non-federal political entity 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. The DEA appropriately instructed the Commissioner of the North Dakota Department of Agriculture that anyone wishing to grow *Cannabis* must obtain a DEA certificate of registration.

III. THE CONTROLLED SUBSTANCES ACT DOES NOT VIOLATE THE COMMERCE CLAUSE.

Plaintiffs also seek a declaration that "interpreting the [CSA] as reaching state-regulated intrastate industrial hemp cultivation where the regulated parts of the plant do not enter interstate commerce would result in an unconstitutional exercise of congressional power beyond that authorized by the Commerce Clause of the U.S. Constitution." Compl. ¶ 7. In other words, Plaintiffs argue that, because the *Cannabis* plants they wish to grow would (theoretically) never leave the state of North Dakota, Congress may not regulate their growth. The Supreme Court recently rejected that very argument.

In *Gonzales v. Raich*, the Supreme Court held that Congress could, under the Commerce Clause, regulate marijuana that was grown and consumed locally for non-commercial, personal medicinal use. 545 U.S. 1, 22 (2005). It explained that "Congress has the power to regulate activities that substantially affect interstate commerce." *Id.* at 17. As part of this well-established power, Congress may "regulate *purely local* activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id.* (citing *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942)) (emphasis added).

The Court noted congressional findings that local growth and distribution of controlled substances affect the interstate traffic in such substances. *Id.* at 12 n.20 (citing 21 U.S.C. § 801(1)-(6)); *id.* at 20. It concluded that these findings were rational: "Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA." *Id.* at 22 (emphasis added). "That the regulation ensnares some purely intrastate activity is of no moment." *Id.*

Raich easily disposes of Plaintiffs' argument that the CSA cannot be interpreted, consistent with the Commerce Clause, to reach Plaintiffs' intrastate cultivation and processing of marijuana. Indeed, Plaintiffs' intended growth of marijuana falls even more squarely within the scope of congressional authority under the Commerce Clause than the *Raich* plaintiffs' intended growth of marijuana. First, unlike the *Raich* plaintiffs – who sought to grow *Cannabis* for their *personal* medicinal consumption – Plaintiffs seek to grow *Cannabis* for *commercial* purposes. *See* Compl. ¶¶ 16-18 (discussing global market for "industrial hemp" products); *see also id.*

¶¶ 38-51 (discussing Plaintiffs' intended sale of *Cannabis* components). In other words, the challenged activity here is a "quintessential economic activity – a commercial farm." *See Raich*, 545 U.S. at 20 (quotations omitted). The Supreme Court established long ago that Congress may regulate the production of *commodities* that remain intrastate as part of its regulation of the interstate market for those same commodities. *See, e.g., United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 121 (1942) (holding that Congress could regulate price of milk sold by producers whose business is entirely intrastate). Second, Plaintiffs acknowledge that the components of their *Cannabis* plants are destined for interstate commerce. Compl. ¶ 50. As such, Congress may regulate the growth of the plant. *See Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 224-25, 235 (1948) (holding that Congress may regulate price of sugar beets that do not enter interstate commerce until processed into sugar).

Plaintiffs may attempt to distinguish *Raich* on the basis that the *Cannabis* plants Plaintiffs seek to grow will presumably have lower THC concentrations than the ones the *Raich* plaintiffs sought to grow. *See* Compl. ¶ 72 (arguing that "*industrial* hemp plants could not possibly . . . 'swell' or increase the supply of the *drug* marijuana") (emphases added). Where Congress has the authority to enact a regulation of interstate commerce, however, "it possesses every power needed to make that regulation effective." *Wrightwood Dairy Co.*, 315 U.S. at 118-19; *see also Raich*, 545 U.S. at 36 (Scalia, J., concurring in the judgment) (same); *Perez v. United States*, 402 U.S. 146, 154 (1971) ("When it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so.") (quotations omitted).

Raich reaffirmed the well-established principle that Congress has the authority to regulate the growth of marijuana – an "economic, commercial activity" – under the Commerce Clause.

545 U.S. at 26; *see also United States v. Davis*, 288 F.3d 359, 362 (8th Cir. 2002) (upholding CSA as valid exercise of congressional authority under Commerce Clause). Congress therefore has "every power needed to make that regulation effective." *Wrightwood Dairy Co.*, 315 U.S. at 118-19. Congress rationally concluded that regulation of all *Cannabis* plants, regardless of their THC content, was necessary to make its regulation of marijuana effective:

> It may be that at some stage the plant destined for industrial products [hemp] is useless to supply enough THC for psychoactive effects. But problems of detection and enforcement easily justify a ban broader than the psychoactive variety of the plant.

United States v. White Plume, 447 F.3d 1067, 1076 (8th Cir. 2006) (quotations omitted) (alterations in original); *see also N.H. Hemp Council v. Marshall*, 203 F.3d 1, 6 (1st Cir. 2000) (same). The Eighth Circuit's recognition that unregulated growth of low-THC *Cannabis* would create enforcement difficulties is consistent with a report of the U.S. Department of Agriculture – cited by Plaintiffs in the Complaint, Compl. ¶ 19 – regarding the "industrial hemp" market. The report noted:

> [T]he two varieties are indistinguishable by appearance. . . . [S]hort of chemical analysis of the THC content, there was no way to distinguish between marijuana and hemp varieties. . . . [P]lanting density and other production characteristics do not offer a reliable way to distinguish varieties for law enforcement purposes.

USDA, "Identification: Industrial Hemp or Marijuana?" *Industrial Hemp in the United States: Status and Market Potential* (Jan. 2000) at 2, attached as Ex. F. By regulating all *Cannabis* plants, Congress vested the DEA with the authority to determine whether a particular proposal for the growth of *Cannabis* is sufficiently controlled so as not to undermine the objectives of the

CSA. In so doing, Congress properly exercised its power to ensure that its regulation of marijuana is effective.[6]

In addition, any attempt to draw distinctions between *Cannabis* varieties for purpose of Commerce Clause analysis ignores the indisputable fact that Plaintiffs seek to engage in a commercial enterprise, one that will result in the introduction of goods into interstate commerce. Regardless 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. *See, e.g.*, *United States v. Darby*, 312 U.S. 100, 115 (1941) (upholding congressional establishment of labor standards for the production of goods that enter interstate commerce, regardless of Congress' purpose).

Because Congress may regulate the growth of *Cannabis sativa L.*, whether intended for interstate commerce or not, Plaintiffs' argument to the contrary is meritless.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court dismiss all claims asserted against them under Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6).

Respectfully submitted,

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[6] While Congress did not make a specific finding that regulation of all *Cannabis* plants, regardless of their THC content, was necessary to effective regulation of marijuana, no such finding was required:

> [W]e have never required Congress to make particularized findings in order to legislate absent a special concern such as the protection of free speech. While congressional findings are certainly helpful in reviewing the substance of a congressional statutory scheme . . ., the absence of particularized findings does not call into question Congress' authority to legislate. . . . Surely, Congress cannot be expected (and certainly should not be required) to include specific findings on each and every substance contained [in the CSA] . . . .

Raich, 545 U.S. at 21 & n.32 (citations omitted).

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Dated: August 20, 2007

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2007, a true and accurate copy of the foregoing document, Defendants' Brief in Support of Their Motion to Dismiss, was filed electronically with the Clerk of Court through ECF and that ECF will send a Notice of Electronic Filing to the following:

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