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

David Monson and Wayne Hauge,)
)
Plaintiffs,)
)
vs.) Civil No. 4:07-cv-42
)
Drug Enforcement Administration)
and Department of Justice,)
)
Defendants.)

TRANSCRIPT OF PROCEEDING

Taken at
United States Courthouse
Bismarck, North Dakota
November 14, 2007

BEFORE THE HONORABLE DANIEL L. HOVLAND
-- UNITED STATES DISTRICT JUDGE --

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APPEARANCES

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FOR THE DEFENDANTS

1 (The above-entitled matter came before the Court, The
2 Honorable Daniel L. Hovland, United States District Court
3 Judge, presiding, commencing at 10:00 a.m., Wednesday, November
4 14, 2007, in the United States Courthouse, Bismarck, North
5 Dakota; counsel appearing on behalf of the respective parties
6 as hereinbefore indicated:)
7 - - - - - - - - - - - -
8 (The following proceedings were had and made of
9 record in open court:)
10 THE COURT: Good morning. Welcome to the Federal
11 District Court. We will open the record in the case entitled
12 *David Monson and Wayne Hauge versus Drug Enforcement*
13 *Administration, United States Department of Justice*, Case
14 Number 07-042. Would counsel note their appearances for the
15 record, please?
16 MS. ERTMER: Wendy Ertmer on behalf of the
17 defendants, Drug Enforcement Administration and Department of
18 Justice.
19 THE COURT: And Mr. Peterson is here as local
20 counsel?
21 MR. PETERSON: Yes, Your Honor.
22 MR. PURDON: For the plaintiffs, Your Honor, Tim
23 Purdon from Vogel Law Firm, and Joe Sandler from the firm of
24 Sandler, Reiff & Young in Washington, DC.
25 THE COURT: And welcome to you out-of-towners to the

1 windy city here today.

2 MR. SANDLER: Thank you, Your Honor.

3 THE COURT: Well, I have read all of the briefs,

4 actually, that have been filed to date several times, but I

5 guess I'll turn first to Ms. Ertmer. Do you wish to make the

6 argument here on behalf of the Department of Justice and DEA?

7 MS. ERTMER: Yes, Your Honor.

8 THE COURT: All right.

9 MS. ERTMER: May it please the Court, Your Honor,

10 plaintiffs in this case seek to grow the marijuana plant so

11 they can harvest its components for use in various commercial

12 goods. They argue that this growth does not require a DEA

13 registration. Now, before I address the Government's motion to

14 dismiss for failure to state a claim, I'd just like to first

15 address the threshold jurisdictional problems that this case

16 presents pursuant to our 12(b)(1) motion to dismiss.

17 First, Your Honor, this Court does not have

18 jurisdiction in this case because under 21 USC Section 877, the

19 courts of appeals have exclusive original jurisdiction over

20 decisions by the DEA under the Controlled Substances Act.

21 Plaintiffs' primary argument in response to Section 877 is that

22 they're not challenging any decision by the DEA, that they're

23 only seeking prospective injunctive declaratory relief to

24 prohibit the DEA or DOJ from taking future enforcement action

25 against them.

1 There's several problems with plaintiffs' argument,
2 Your Honor. First is that their pleadings undermine this
3 argument. Plaintiffs have argued repeatedly in their pleadings
4 that DEA was wrong when it said in a letter of February 1,
5 2007, that the definition of marijuana includes the plant
6 plaintiffs seek to grow. Plaintiffs cannot seriously dispute
7 that we wouldn't be here right now if DEA had agreed with
8 plaintiffs that the plant they seek to grow is not marijuana
9 and they, therefore, don't need to register with the DEA.
10 Allowing this lawsuit to proceed in this forum, Your
11 Honor, would essentially eviscerate Section 877. Plaintiffs
12 could often characterize an adverse DEA decision as an action
13 for declaratory judgment, allowing them to do what DEA has just
14 told them they can't do.
15 The bottom line here, Your Honor, is that Congress
16 charged the DEA, through the -- through the Attorney General,
17 with administering the Controlled Substances Act, and Congress
18 charts the courts of appeals were for viewing the CSA-based
19 determinations that DEA has made under that act. With this
20 lawsuit plaintiffs have bypassed both of those mechanisms that
21 Congress established, and so 877, we would submit, is a
22 jurisdictional bar to this action.
23 THE COURT: So are they challenging a final decision
24 of the DEA?
25 MS. ERTMER: Your Honor, we would suggest that

1 regardless of whether the decision is final, this Court does
2 not have jurisdiction. It's for the Court of Appeals to decide
3 whether or not the determination is final, but the Court of
4 Appeals has exclusive jurisdiction, so even if this is a
5 nonfinal decision, the case still belongs, if anywhere, in the
6 Court of Appeals.
7 THE COURT: But 877 says they have jurisdiction to
8 review final decisions of the DEA.
9 MS. ERTMER: Right. If there's -- if this is an
10 nonfinal decision, Your Honor, if plaintiffs are challenging a
11 decision that DEA has made that's nonfinal, then this Court
12 doesn't have jurisdiction either because the APA only allows
13 review -- I'm sorry. If this Court -- if this non -- if this
14 is a nonfinal determination, the district court doesn't have
15 jurisdiction either because under the APA, only final decisions
16 are subject to judicial review, and that was the holding of *Doe*
17 *versus Drug Enforcement Administration*.
18 THE COURT: But are they not seeking a declaration
19 that the Controlled Substances Act simply does not apply to
20 their plan, cultivation of industrial hemp, so they're asking
21 for a declaratory judgment?
22 MS. ERTMER: Exactly, Your Honor, but that would be a
23 direct challenge to the determination that the DEA made that
24 the Controlled Substances Act does regulate the growth of the
25 cannabis plant.

1 THE COURT: So does -- this Court certainly has
2 jurisdiction to issue a declaratory judgment.
3 MS. ERTMER: Well, in general, yes, Your Honor, but
4 in the presence of a specific jurisdictional provision vesting
5 exclusive jurisdiction in the courts of appeals, that
6 jurisdiction -- that jurisdictional provision takes precedence
7 over the more general jurisdictional provisions of the -- of
8 the federal question.
9 THE COURT: I was reading the Declaratory Judgment
10 Act this morning, and it says whenever there's an appropriate
11 pleading filed, i.e., a complaint, Federal Court may issue a
12 declaratory judgment irrespective of any other or further
13 relief that the parties may be requesting.
14 MS. ERTMER: And again, we would suggest, Your Honor,
15 that Section 877 is the exclusive means of review and would --
16 would take precedence over that general declaratory judgment --
17 THE COURT: So has there ever been a similar case
18 like this that has gone up to a court of appeals pursuant to 21
19 USC 877?
20 MS. ERTMER: Well, *Doe versus DEA* was considered
21 under 21 USC Section 877.
22 THE COURT: That went up to where, the D.C. Court of
23 Appeals?
24 MS. ERTMER: D.C. Court of Appeals, Your Honor.
25 *Gonzales versus Oregon* was a case in the Ninth Circuit Court of

1 Appeals that was initially brought in the district court. The
2 district court said despite Section 877, it had jurisdiction.
3 The Ninth Circuit said that it did not and that it needed to be
4 brought in the Ninth Circuit, but the Ninth Circuit did -- the
5 case was transferred to the Ninth Circuit, and the Ninth
6 Circuit reviewed it pursuant to Section 877 holding that the
7 district court did not have jurisdiction.
8 THE COURT: But the other decision, the district --
9 the federal district court noted that it had jurisdiction
10 irrespective of 877.
11 MS. ERTMER: I'm sorry. Could you repeat your
12 question, Your Honor?
13 THE COURT: The other case that you mentioned, the
14 federal district court concluded that it had jurisdiction
15 irrespective of 877.
16 MS. ERTMER: That's right, Your Honor, the district
17 court did and the case was transferred to the Ninth Circuit
18 Court of Appeals. The Ninth Circuit considered the question
19 and held the district court did not have jurisdiction, it
20 should have been brought --
21 THE COURT: Of course, I'm not sure I want to follow
22 opinions of the Ninth Circuit Court of Appeals, but anyway.
23 MS. ERTMER: So, Your Honor, we would suggest that,
24 as I said, 877 is an independent jurisdictional bar to this
25 action.

1 Also, Your Honor, this case presents significant
2 standing or rightness problems. Whether it's viewed in terms
3 of standing or rightness, the basic problem is the same, and
4 that problem is that plaintiffs have not yet suffered an injury
5 that entitles them to judicial review. There's been no
6 enforcement taken in this case. There's been no specific
7 threat of enforcement. Indeed, to our knowledge, plaintiffs
8 are not growing marijuana, so there could never be a threat of
9 enforcement.
10 THE COURT: So do they have to expose themselves to
11 an arrest in order to challenge a federal statute?
12 MS. ERTMER: Except in very narrow circumstances, the
13 answer to that question is yes, Your Honor. Those
14 circumstances are these. In First Amendment cases, courts have
15 held that where the claimed injury is -- you know, the criminal
16 statute chills potentially protected speech, the plaintiff need
17 not wait for specific threat of enforcement in order to
18 challenge the law. The injury in those cases is the injury of
19 self-censorship, but that is limited to the First Amendment
20 contacts.
21 Another instance is when a new law or regulation
22 effectively changes the status quo, forcing a person who was
23 already engaging in newly regulated conduct to choose between
24 undertaking costly or burdensome compliance measures or risking
25 prosecution. This was a situation in *Abbott Labs*, Your Honor,

1 in which new FDA regulations substantially changed the way
2 pharmaceutical companies had been conducting their business.
3 And in that case the Court held that the pre-enforcement
4 challenge was right.
5 But cases like that simply don't apply here, Your
6 Honor, because plaintiffs need not change anything about the
7 way they've been doing business to comply with federal law.
8 The federal law simply requires them to farm the same way
9 they've farmed for years unless and until they obtain a DEA
10 registration. The bottom line is that plaintiffs --
11 THE COURT: But the DEA is never going to issue them
12 a registration. I mean, there's no realistic prospect that the
13 plaintiffs will ever be granted a registration, certificate or
14 a license by the DEA to cultivate industrial hemp, is there?
15 MS. ERTMER: The DEA is in the -- is in the process
16 of considering the registration applications that plaintiffs
17 have filed.
18 THE COURT: But there's no realistic opportunity that
19 that application is ever going to be granted. Has it ever been
20 granted by the DEA when there's been a request submitted to
21 grow industrial hemp?
22 MS. ERTMER: The DEA has granted registrations for
23 the bulk manufacture of marijuana. The University of
24 Mississippi holds a license to manufacture marijuana in bulk.
25 The University of Hawaii has in the past been granted

1 registrations for the research into the use of marijuana for
2 production of industrial products, so that process is in its
3 early stages. The registration applications were submitted
4 earlier this year. The DEA --
5 THE COURT: By these plaintiffs?
6 MS. ERTMER: By these plaintiffs, yes, Your Honor.
7 And the DEA published the Federal Register notices announcing
8 those applications as it was required to do, provided a notice
9 period, and also reviewed the applications and sent plaintiffs
10 a series of questions for them to answer giving the DEA more
11 details on those -- on those applications. At that point
12 plaintiffs filed this lawsuit instead of -- instead of
13 responding to the DEA's questions, so, Your Honor --
14 THE COURT: So have there just been two incidents
15 where the DEA has granted a license to grow industrial hemp,
16 namely in Hawaii and at the University of Mississippi, was it?
17 MS. ERTMER: Those are two examples of which I'm
18 aware. I'm not assured -- I'm not certain to what extent there
19 have been additional applications or grants of applications,
20 Your Honor.
21 And as a general matter, registrations for the bulk
22 manufacture of marijuana, which were the registrations
23 plaintiffs are seeking here and also the registrations that I
24 mentioned, the University of Mississippi has, those are matters
25 of public record. They're published in the Federal Register,

1 but others for sort of research purposes are generally not
2 matters of public record, so those are two instances of which
3 I'm aware, but like I said, I'm not certain to what extent
4 there have been even additional applications.
5 THE COURT: So why did the University of Mississippi
6 need to grow bulk marijuana?
7 MS. ERTMER: Pardon?
8 THE COURT: For what purpose did the University of
9 Mississippi need to grow bulk marijuana for which they
10 requested a license from the DEA?
11 MS. ERTMER: I believe the University of
12 Mississippi's initial license was for research purposes, and
13 that's still the purpose for which the University of
14 Mississippi is -- maintains that registration, Your Honor.
15 THE COURT: So tell me about NDSU's application
16 that's been sitting there for eight years. What's the problem?
17 MS. ERTMER: Well, first of all, Your Honor, the
18 status of a third party's application is not something that is
19 publically disclosable at this stage.
20 THE COURT: But they've -- but NDSU has submitted an
21 amicus brief and they've laid out the entire scenario of events
22 that have occurred concerning their application that was
23 submitted in 1999 and the fact that no action has been taken by
24 the DEA to date on it, so it's -- they've waived their --
25 whatever privilege that they may have to disclosing that

1 information.

2 MS. ERTMER: Well, that process may not -- I mean,

3 NDSU may have waived its privilege, but the DEA also, you know,

4 maintains a deliberate -- deliberate of process privilege with

5 respect to what's going on with the -- with any application by

6 NDSU.

7 THE COURT: Okay. So I don't want to know what the

8 DEA has done, but tell me why it's taken eight years to

9 complete that application process.

10 MS. ERTMER: Your Honor, I would just suggest that

11 every application is evaluated on its own merits. And like I

12 said, DEA has granted applications in the past and

13 demonstrating that this administrative process is not futile.

14 And, Your Honor, regardless of what is going on with

15 NDSU's applications -- I mean, even if plaintiffs could

16 demonstrate that there's been -- you know, based on, you know,

17 the delay that they allege with respect to NDSU's application,

18 even if they could demonstrate that that sort of serves as a de

19 facto denial of plaintiffs' registration application that makes

20 this case ripe for review, then this case belongs in the Court

21 of Appeals under 877 as a specific denial of a registration

22 application under the CSA. So like I said, the details of

23 NDSU's application are simply irrelevant to the plaintiffs'

24 application.

25 THE COURT: Well, they might be irrelevant, but

1 plaintiff doesn't have to exhaust his or her administrative
2 remedies if to do so would be an exercise in futility, and
3 plaintiffs in this case looked to NDSU, who's had an
4 application pending for eight years, and they can reasonably
5 conclude that there's -- they're going to be treated in a same
6 or similar fashion, so why go through the process.
7 MS. ERTMER: Because there's simply no reason to
8 believe under the facts of this case that the administrative
9 process is not taking place. As I said, DEA has pursued the
10 process. It has -- it has promptly responded to plaintiffs'
11 registration application. There's no reason in this case to
12 believe that DEA is pursuing these applications in anything
13 less than, you know, an expeditious and fair manner.
14 THE COURT: This is unrelated, but about NDSU, who's
15 filed an amicus brief, but is eight years a reasonable amount
16 of time for an application to remain pending?
17 MS. ERTMER: Your Honor, the -- again, I just
18 maintain that the details of that application are simply
19 immaterial, and, you know, I don't know the circumstances of
20 the NDSU -- of the NDSU application. There are any number of
21 reasons why a particular application may be held up in the
22 administrative process, but here there's no reason to believe
23 that the application is being held up in the administrative
24 process. The only thing that we know is that plaintiffs have
25 failed to pursue that administrative process and have brought

1 this lawsuit instead.

2 THE COURT: But they started the process and there's

3 been publication in the Federal Register, right?

4 MS. ERTMER: Exactly.

5 THE COURT: So once you jump all of the appropriate

6 hurdles and exhaust your administrative remedies, what's the

7 time frame that it should reasonably take to get a final

8 decision from the DEA on a pending application?

9 MS. ERTMER: There's no specific time frame provided

10 for in the --

11 THE COURT: Assume the best case scenario, that they

12 respond -- the plaintiffs respond to every request from the DEA

13 and the DEA is timely in their responses, everybody jumps over

14 the hurdles they need to jump over quickly and promptly. Can

15 it be done in less than six months? Can it be done in less

16 than a year? I would assume that it ought to be able to be

17 done in less than a year, but I don't know.

18 MS. ERTMER: Well, the only specific, you know,

19 minimum time period that I'm aware of in the regulations is the

20 60-day notice to comment period that's required for the Federal

21 Register notice, which because it was published in June is

22 certainly lapsed at this point, but the registration -- the

23 823(a), which sets forth the factors that DEA must consider for

24 evaluating a registration application, you know, includes --

25 includes investigation into such factors as, you know, the

1 security measures that plaintiffs have in place. It includes
2 an on-site investigation of plaintiffs -- or of the applicants'
3 registration -- or manufacturing facilities, Your Honor.
4 I would imagine that every application really, you
5 know, takes a different amount of time in terms of the
6 coordination with the applicants and, you know, the -- you
7 know, the details in terms of getting to the site and
8 investigating the site, and so I don't know that I could give
9 you a specific period of time that a typical application would
10 take.
11 And I'm also not sure that there is a typical -- that
12 this is a typical application, Your Honor. I don't believe
13 that it's common for applicants to request to manufacture
14 marijuana in bulk, so I don't know that there's really much DEA
15 precedence for us to be able to say, you know, this is a
16 typical period of time that the administrative process would
17 take.
18 And again, Your Honor, I just want to reiterate that
19 to the extent that this Court would determine, you know, based
20 on the arguments that plaintiffs have made, including the brief
21 that NDSU has submitted, that there's been a de facto denial of
22 their registration application that this -- that makes this
23 case ripe for review, that this case absolutely belongs in the
24 Court of Appeals as review under Section 877.
25 THE COURT: Instead of making those arguments, why

1 doesn't the DEA just arbitrarily deny the application and so we
2 can move forward? I mean, why delay this with the
3 administrative process and notice and opportunity for public
4 comment? I mean, I -- in my view it's -- I don't see any
5 realistic prospect that the plaintiffs in this case are ever
6 going to be issued a license. It doesn't matter what they
7 undertake for security measures and it doesn't matter what
8 responses they provide to the DEA. The DEA is going to be hard
9 pressed to grant a license in this case, probably the first
10 case ever in the country where they've granted a license to a
11 private grower of industrial hemp, so I -- I mean, I think we
12 can all sit here and agree that it ain't going to happen, so --
13 MS. ERTMER: Well, nonetheless, you know, the DEA is
14 statutorily required to consider a number of factors in terms
15 of granting registration applications. It's required to do
16 that. It's required to do that in good faith, and it's pursued
17 this application in good faith, as Congress required it to do.
18 It may be the first one, but, you know, there was,
19 you know, a first researcher of marijuana that was granted an
20 application. And, you know, I'm not here to make any sort of
21 representation about what the merits of plaintiffs'
22 registration applications are. That's DEA's job, obviously,
23 but all I can tell you is that DEA has a statutory duty to
24 pursue those applications pursuant to Section 822 and 823 of
25 the Controlled Substances Act.

1 Moving on to the Government --

2 THE COURT: Let me ask you a different question on a
3 related matter, but it's not something that's been raised in
4 the briefs, but there's a bill that's pending in the House
5 called the Industrial Hemp Act of 2007, introduced in February
6 of -- February 13, 2007. It's House Resolution 1009. Has
7 there been a formal hearing on that bill, and if so, has the
8 DEA and the Department of Justice taken a position on that
9 bill? And the sole purpose of the bill is to redefine
10 marijuana to exclude industrial hemp from that definition. Do
11 you know what the status of that bill is?

12 MS. ERTMER: I actually don't know the status of the
13 bill, Your Honor.

14 THE COURT: Do you know whether the DEA has taken a
15 position on that bill, which goes to the heart of this -- the
16 issue in this case?

17 MS. ERTMER: The jurisdictional issue?

18 THE COURT: Not the jurisdictional issue, but whether
19 industrial hemp is considered to be a controlled substance, is
20 considered to be marijuana under the Controlled Substances Act.

21 MS. ERTMER: Well, I do know that, you know, the DEA
22 obviously believes, and as we've represented in our briefs,
23 that industrial hemp, as North Dakota has defined that term, is
24 a controlled substance under the current Controlled Substances
25 Act. Exactly what DEA's response has been to the pending

1 legislation I can't speak to.
2 THE COURT: But you don't know where that bill is at
3 in the grand scheme of things, HR 1009.
4 MS. ERTMER: That's -- pardon, Your Honor?
5 THE COURT: HR 1009, you don't know what the status
6 of that bill is.
7 MS. ERTMER: I don't know. All I can tell you is
8 what the current Controlled Substances Act does and what it
9 regulates.
10 There are two questions that plaintiffs have raised
11 in this case that we addressed in our 12(b)(6) motion to
12 dismiss, Your Honor. The first is whether under the Controlled
13 Substances Act, plaintiffs must obtain a DEA registration
14 before growing the plants they seek to grow.
15 Under the Controlled Substances Act, any person who
16 wishes to grow Schedule I controlled substance must obtain a
17 DEA registration. Marijuana is a Schedule I controlled
18 substance and is defined as all parts of the plant, cannabis
19 sativa L. Plaintiffs concede that they seek to grow the plant,
20 cannabis sativa L. They, therefore, must obtain a
21 registration, and that's really the end of the statutory
22 interpretation question plaintiffs have raised in this case,
23 Your Honor.
24 The definition of marijuana is clear on its face. It
25 doesn't matter that North Dakota has given plaintiffs a license

1 to regulate what the North Dakota statute refers to as
2 industrial hemp. It's still marijuana for purposes of federal
3 law. It doesn't matter that the plants are grown for
4 industrial purposes instead of hallucinogenic purposes, as
5 plaintiffs have claimed. It's still marijuana. It doesn't
6 matter what the THC content is of the plant plaintiffs seek to
7 grow. It's still marijuana under the CSA. That definition
8 draws no distinctions on any of these bases. Plaintiffs,
9 therefore, must obtain a registration.
10 Courts, including the Eighth -- Eighth Circuit in
11 *United States versus White Plume*, have already considered this
12 precise question and resolved it in the Government's favor.
13 Just as North Dakota has done here, in *White Plume* the Oglala
14 Sioux tribe had legalized growth of marijuana for industrial
15 purposes as long as the marijuana contained THC below a
16 specified level.
17 *White Plume*, the defendant in that case, grew
18 marijuana without a DEA registration. The Court held that the
19 CSA does not distinguish between marijuana and hemp, and that
20 any growth of the cannabis plant would require a DEA
21 registration. The Eighth Circuit did so in the face of
22 arguments that the marijuana plants *White Plume* grew were
23 nonpsychoactive, just as plaintiffs claim here.
24 To avoid *White Plume*, plaintiffs have argued that
25 Congress could not have intended to regulate cannabis that will

1 never enter interstate commerce, but the CSA, Your Honor, draws
2 no distinction between cannabis that remains within the state
3 and cannabis that crosses state lines. All of it is designated
4 as marijuana. Indeed, Congress clearly stated in the CSA that
5 it intended to regulate purely intrastate growth of controlled
6 substances because for enforcement purposes you can't
7 distinguish between plants whose growers intend to keep them in
8 the state and plants whose growers intended to distribute them
9 across state lines. Congress clearly intended to regulate all
10 cannabis plants, regardless of destination, as marijuana.
11 Plaintiffs also make much of the fact that the
12 stalks, the fiber, the seed of the cannabis plants are not
13 included within the definition of marijuana. These exemptions,
14 which may allow certain plant components to be imported into
15 the United States, don't change the fact that Congress did
16 regulate the growing marijuana plant. And to produce the
17 stalks, the fiber, the seed, the oil, you have to grow the
18 plant. That Congress chose not to regulate certain potentially
19 more innocuous components of the plant says nothing about
20 Congress's intent to regulate the entire plant.
21 The First Circuit in *New Hampshire Hemp Council*
22 reached the same conclusion as the Eighth Circuit did in *White*
23 *Plume*. Other courts have stated the same in dictum, the Ninth
24 Circuit, for example, in *Hemp Industries Association*. We're
25 aware of no court that's held to the contrary on this point.

1 THE COURT: The First Circuit also said the
2 plaintiffs had standing to challenge the law, correct?
3 MS. ERTMER: They did, Your Honor, and we would
4 suggest that the First Circuit applied for relaxed, First
5 Amendment type of analysis in its standing -- in terms of
6 standing than what -- than what was proper. And that in terms
7 of standing, because there's been no enforcement action here,
8 no specific threat of enforcement and because this isn't a
9 First Amendment case, plaintiffs don't have standing.
10 But taking a step back from the statutory
11 interpretation question for a moment, Your Honor, Supreme
12 Courts recognize, since the legislative history reflects,
13 Congress fully intended not only to regulate the illegitimate
14 use of drugs, but also legitimate traffic in controlled
15 substances. Plaintiffs' arguments all go to the question
16 whether plaintiffs' particular growth and possession of
17 controlled substance is legitimate, whether it's going to
18 contribute to the nation's drug abuse problem and -- but those
19 arguments aren't relevant.
20 The Controlled Substances Act is a comprehensive
21 scheme to regulate the legitimate and the illegitimate traffic
22 in controlled substances. They wanted to ban the illegitimate
23 and give DEA the authority to regulate the legitimate, so all
24 of plaintiffs' arguments about the legitimacy of their growth
25 of the cannabis plant really are arguments that should be

1 addressed to the DEA in the context of a registration
2 application.
3 And that's really -- you know, as I said, the
4 statutory interpretation question presented in this case, Your
5 Honor, is very straightforward. I mean, the definition of
6 marijuana is very clear, as both the Eighth Circuit and the
7 First Circuit have held.
8 Moving to the commerce clause question that
9 plaintiffs have raised, plaintiffs have argued that regulating
10 the marijuana plant that plaintiffs seek to grow violates the
11 commerce clause. More specifically, they argue that the
12 marijuana they seek to grow will never leave the State of North
13 Dakota until it's processed into, quote, nondrug products.
14 An argument in -- identical in all relevant respects
15 has recently been rejected by the Supreme Court, as we argued
16 in our brief. In *Gonzales versus Raich,* the Court held that
17 Congress could regulate purely local growth of marijuana
18 pursuant to its commerce power. The Court held that controlled
19 substances are commodities, and that Congress reasonably
20 concluded that local production of those commodities affects
21 interstate commerce.
22 In *United States versus Davis*, the Eighth Circuit
23 also held that Congress may regulate the local production of
24 controlled substances pursuant to its commerce power, and this
25 case is no different. Plaintiffs seek to grow a substance that

1 Congress designated a controlled substance. Under *Davis* and
2 *Raich*, Congress may regulate the local production of that
3 substance even if it never enters interstate commerce.
4 You know, plaintiffs have attempted to distinguish
5 this authority by arguing that what they seek to grow is not
6 really a drug and, therefore, can't affect the interstate
7 market for what they refer to as, you know, drug marijuana,
8 which is what they say Congress was really concerned about in
9 the CSA.
10 THE COURT: In *Gonzales* it was marijuana being grown
11 for medicinal purposes.
12 MS. ERTMER: Medicinal purpose, Your Honor, as
13 opposed to here where plaintiffs seek to grow marijuana for
14 industrial purposes. Plaintiffs in re -- or in *Raich* sought to
15 grow marijuana for their personal medicinal consumption, a
16 noncommercial use.
17 But, Your Honor, this argument that the substance
18 they seek to grow is not really a drug and, therefore, can't
19 affect the interstate market for the drug marijuana, first of
20 all, ignores the fact that the CSA draws no distinction. It is
21 a drug. All marijuana is the drug marijuana. *Raich* drew no
22 such distinction.
23 THE COURT: And the CSA apparently says that any
24 material that contains THC, regardless of content, is a
25 Schedule I controlled substance.

1 MS. ERTMER: It does. Independently of its
2 regulation of marijuana, it states that any THC containing
3 material is a Schedule I controlled substance.
4 In addition, Your Honor, regardless of its
5 relationship to what plaintiffs refer to as the drug marijuana,
6 as if there were some bright line distinction between the drug
7 marijuana and what plaintiffs seek to grow, ignores the fact
8 that this is a commodity. They're engaged in a commercial
9 enterprise, and Congress can regulate the local production of
10 commodities.
11 Also, even granting this sort of bright line
12 distinction between -- between what plaintiffs refer to as the
13 drug marijuana and what North Dakota defines as industrial
14 hemp, it's a well established principle that Congress, in the
15 course of a valid exercise of its commerce authority, has the
16 authority to make sure that that regulation is effective.
17 The Eighth Circuit held in *White Plume* that Congress
18 rationally determined that regulation of all cannabis was
19 necessary for a regulation of the psycho -- psychoactive
20 variety. And so even if there is some bright line distinction,
21 it was absolutely established in *Gonzales versus Raich* that
22 Congress validly exercised its commerce power to regulate the
23 local production of marijuana. Congress had the power to make
24 sure that that regulation was effective.
25 So to the extent that the definition of marijuana

1 more broadly sort of encompasses, you know, something that
2 plaintiffs refer to as, you know, a nondrug, the Eighth Circuit
3 already concluded in *White Plume* that Congress rationally
4 determined that that regulation was -- was necessary for
5 effective regulation of the psychoactive variety. Congress's
6 decision to regulate all cannabis was, therefore, valid
7 exercise of its commerce power, and that is the end of the case
8 or end --
9 THE COURT: So you're saying the remedy is a
10 legislative one.
11 MS. ERTMER: Exactly, and that's exactly what *White*
12 *Plume* said as well. If there is --
13 THE COURT: But you can't tell me what the DEA or the
14 Department of Justice's position is on the Industrial Hemp
15 Farming Act of 2007, which would exclude industrial hemp from
16 the definition of marijuana under the Controlled Substances
17 Act.
18 MS. ERTMER: What I can tell you is right now the
19 Controlled Substances Act defines the plant plaintiff seeks to
20 grow as marijuana, Your Honor. To the extent there is a
21 remedy, it's legislative.
22 Also, Your Honor, the Controlled Substances Act
23 itself, the way it's structured is it established these five
24 schedules of controlled substances, and then it defined sort of
25 the criteria that would be required to schedule a controlled

1 substances -- a substance in one of those schedules, and then
2 it sort of -- it established these sort of preliminary
3 schedules in that Section 812 of Controlled Substances Act,
4 which includes marijuana.
5 Congress established those sort of preliminary
6 schedules of controlled substances, but then it gave the DEA
7 the authority to deschedule. It said if the DEA determines
8 that a particular substance does not meet the criteria for that
9 schedule, DEA can deschedule it, so in addition to a possible
10 legislative remedy, Your Honor, plaintiffs could also seek to
11 have a certain category of marijuana descheduled.
12 THE COURT: Yeah, but the DEA is not going to do
13 that.
14 MS. ERTMER: I can't -- this case is not about the --
15 a challenge to a DEA denial of rescheduling order, Your Honor.
16 This case is simply about whether the Controlled Substances
17 Act, in its current -- in its current state, regulates the
18 plant plaintiffs seek to grow, and it clearly does as
19 marijuana. If the Court has no further questions --
20 THE COURT: All right. Thank you. Mr. Sandler or
21 Mr. Purdon.
22 MR. PURDON: Before we get started, Your Honor, I
23 would just like to introduce the plaintiffs who are here as
24 well. We have -- from Osnabrock, North Dakota, we have Wayne
25 -- excuse me, David Monson, who is a member of North Dakota

1 State Legislature. He's the assistant -- the majority leader
2 in the House. He's also the principal of the Edinburg school.
3 Then we have Wayne Hauge from Ray, North Dakota, who is a
4 farmer in Ray, a certified seed dealer and a certified public
5 accountant. They're here with us today. Mr. Sandler from
6 Sandler, Reiff & Young, and he's going to present the argument
7 for the plaintiffs.
8 THE COURT: Welcome, gentlemen, and welcome to you,
9 Mr. Sandler.
10 MR. SANDLER: Thank you, Your Honor. What's unique
11 about this case is that North Dakota is the first and only
12 state in the country to have enacted a regulatory system for
13 the cultivation of industrial hemp, and that system is designed
14 to ensure two things; first, that only those parts of the hemp
15 plant which are already exempt from regulation under federal
16 law, which is hemp stalk, fiber, nonvaluable seed and oil, will
17 enter commerce of any kind, interstate, intrastate or
18 otherwise; and second, that the plants themselves will contain
19 so little THC, the psychoactive element in marijuana, as to
20 make the plants themselves absolutely useless as drug
21 marijuana.
22 Now, after enacting this system, the North Dakota
23 Legislature itself concluded that the exclusive power, federal
24 regulation to regulate drug marijuana conferred on the Drug
25 Enforcement Administration, does not extend so far as to

1 prohibit the in-state cultivation of industrial hemp under this
2 state regime. And last April the state legislature repealed
3 the requirement that was formerly in state law that farmers
4 seeking to cultivate industrial hemp under the state law also
5 had to obtain a license from DEA.
6 THE COURT: Of course, they did that because of the
7 letters that the plaintiffs were receiving from DEA officials.
8 MR. SANDLER: Exactly, and then -- but by deciding
9 that, the state itself, in effect, invited farmers to obtain
10 state licenses, made those licenses effective under state law
11 without the need for federal registration, and then left it to
12 the farmers who had obtained state licenses to come to court to
13 seek a declaration that they could proceed without fear of
14 federal prosecution, and that's why Representative Monson and
15 Mr. Hauge are here before this Court.
16 Now, DEA, of course, points to the plain language of
17 the Controlled Substances Act, which does indeed treat all
18 species of the cannabis plant as a controlled substance, and
19 their point being that since it's technically the same species,
20 that's the end of the matter. Now, it is important to clarify
21 in that regard.
22 THE COURT: Well, it's not only their point, it's the
23 Eighth Circuit Court of Appeals' point.
24 MR. SANDLER: It is the Eighth Circuit Court of
25 Appeals' point in a case in which this overlay of state

1 regulation was not -- was not present, but I did want to
2 mention that in response to a question from the Court, the
3 Government suggested that anything that contains THC is subject
4 to the Controlled Substances Act. That is not, in fact, the
5 case. The Controlled Substances Act does separately list THC
6 as a controlled substance in Schedule I, but that only refers
7 to synthetic THC, as the Ninth Circuit Court of Appeals held in
8 the *Hemp Industries Association* --
9 THE COURT: I thought the Eighth Circuit Court of
10 Appeals in *U.S. versus White Plume* said that the CSA recognizes
11 that any material that -- that any material that contains THC
12 is considered to be a Schedule I controlled substance.
13 MR. SANDLER: Right, but that's actually not -- not
14 the case. Even if hemp contains zero THC, and the plants we're
15 talking about here for all practical purposes, that is the
16 case, it would still be classified as cannabis because -- but
17 only because, and the DEA is correct in this regard, it is
18 technically of the same biological species, cannabis sativa L.
19 But what DEA overlooks is that this same statute,
20 CSA, same definition of marijuana, contains plain language that
21 for the last 70 years has exempted hemp stalk, fiber, seed and
22 oil from federal regulation for the obvious purpose of
23 promoting and protecting a legitimate hemp industry. And the
24 question in this case is not how to reconcile those two
25 provisions generally, but how to do so given this overlay of

1 state regulation.

2 And this overlay of state regulation to which we're

3 pointing is not some effort by the State of North Dakota to

4 substitute state regulation of drug marijuana for federal

5 regulation, which we all understand is exclusive. This is not

6 the California medical marijuana case, which was about state

7 effort to regulate drug marijuana.

8 THE COURT: But what North Dakota is asking the

9 federal government to do is to forgo all regulation of

10 marijuana as long as it meets the North Dakota's definition of

11 industrial hemp, i.e., it contains less than three-tenths of

12 one percent of THC.

13 MR. SANDLER: Not to forgo. The State is saying that

14 they are going to enact and enforce a regime under which the

15 only parts of this plant that would leave the plaintiffs' --

16 would leave the farmers' property even, would -- are those that

17 Congress has already -- the plain language of the Controlled

18 Substances Act already exempts from regulation.

19 Now, it's true that absent this state regulation,

20 this state regime, you say, well, it doesn't really make sense

21 for Congress to allow people to import, trade, sell hemp stalk,

22 fiber, seed and oil, but not grow the plant itself. We

23 recognize that as logical as that result is, it's unavoidable.

24 That's the *White Plume* case. That's the *New Hampshire Hemp*

25 *Council* case.

1 But we submit, Your Honor, but that's not this case
2 because here the -- we believe because of the nature of -- the
3 unique nature of this state regulatory regime, the exclusive
4 federal regulation of drug and comprehensive federal regulation
5 of drug marijuana cannot be extended so far as to cover the
6 interstate cultivation of industrial hemp under this state
7 regime.
8 We don't have to guess, first of all, why Congress
9 wanted to regulate interstate cultivation of marijuana. The
10 findings of the -- of the Controlled Substances Act make it
11 clear because you can't distinguish interstate from intrastate
12 growth, cultivation of marijuana when it comes to the supply of
13 drug marijuana, which grown in-state obviously affects the
14 whole national market. Whether somebody consumes it
15 themselves, that's less that they buy, and consequently
16 interstate commerce is inevitably affected.
17 But under the North Dakota regime, the only things
18 that enters commerce are these parts of the plants that
19 Congress has determined not to regulate. And even to the
20 extent we say, well, Congress must have intended that the
21 regulated parts of the hemp plant, which would the flowering
22 tops, should not get into commerce, even whether or not they
23 can be used as drugs, we accept that proposition of DEA.
24 Here the State regulatory regime prevents that. The
25 flowering tops are not allowed to leave the farmers' property,

1 so the idea that this somehow could wind up as ditch weed and
2 maybe used as filler and sold as marijuana is not -- it's as
3 illegal under the state law to do that as it -- as it is under
4 the -- under the federal law.
5 And finally, we believe that if the statute isn't
6 reconciled and interpreted in this way and is instead extended
7 to cover the interstate -- the cultivation under the state
8 regime, it would exceed -- represent exceeding Congress's reach
9 under the commerce clause.
10 What the Supreme Court made clear in the *Raich* case
11 is that Congress can regulate purely interstate activity
12 relating to a commodity if it concludes that failure to
13 regulate that class of activity, which is basically a quote, a
14 paraphrase, would undercut the regulation of the interstate
15 market in that commodity. Now, in the *Raich* case there was
16 only one commodity at issue, drug marijuana. Medical marijuana
17 is drug marijuana. It's just used for a different purpose.
18 It's not -- it's the same thing.
19 That's not true, obviously, of the industrial hemp to
20 be cultivated here. First of all, the plants themselves are
21 not going to be consumed or used in any way other than the
22 parts that Congress has already determined should be exempted
23 from regulation.
24 THE COURT: The ordinary layperson cannot distinguish
25 between the plants, can they? I mean, a plant -- cannabis

1 plant used primarily for industrial hemp purposes versus one
2 that's used for street drug marijuana. I mean, the plant is
3 the same, correct?
4 MR. SANDLER: The plant can look -- I mean, I think
5 that farmers can distinguish it. The ordinary layperson
6 probably can't. There's a lot of things I couldn't distinguish
7 that are completely different species, but it's -- I think that
8 farmers can distinguish it. Certainly the Agriculture
9 Department of North Dakota charged with enforcing this scheme
10 is capable of distinguishing from it, and there's nothing to
11 prevent, again, federal drug enforcement in the event that
12 somebody tried to plant drug marijuana, that it wouldn't be any
13 conflict between state and federal law in terms of being able
14 to enforce the law against such an individual.
15 THE COURT: Does it not create some enforcement
16 nightmares? I mean, the DEA is obviously concerned about
17 enforcement and --
18 MR. SANDLER: Excuse me, Your Honor?
19 THE COURT: Concerned about enforcement and criminal
20 activity associated with the growth of the plants.
21 MR. SANDLER: It's not clear that their concern --
22 what exactly the enforcement concern is in terms of a state
23 regime in which only hemp stalk, fiber, seed and oil can leave
24 the farmers' premises. It's not -- we don't see a readily
25 ascertainable enforcement concern that the farmers are going to

1 try to -- these farmers are going to try to hide marijuana
2 plants in the field, even though it's open to the inspection
3 and there's geopositioning. It's the -- the location is
4 reported to the authorities. It doesn't seem like a sensible
5 way for somebody who wanted to violate the law to try to do so
6 by taking advantage of this scheme.
7 So we just think, again, under the -- under the
8 commerce clause, that it's not fungible and for this purpose,
9 commerce clause analysis, we're not talking about legal
10 fungibility, that it's in the same technical legal
11 classification. We're talking about real fungibility. Can you
12 get high from it? Can it substitute for marijuana? No, it
13 can't.
14 And what -- could it possibly be that Congress wanted
15 to regulate the intrastate activity in something that affects
16 nothing but interstate trade in hemp stalk, fiber, seed and
17 oil, which on the interstate level Congress has said we have no
18 interest in regulating. And it's for those reasons we submit,
19 Your Honor, that this is the logical Constitutional way to read
20 the Controlled Substances Act, is that it does not extend so
21 far as to prohibit the proposed in-state cultivation of
22 industrial hemp pursuant to state license by Representative
23 Monson and Mr. Hauge.
24 THE COURT: Isn't the best remedy to amend the
25 definition of marijuana under the Controlled Substances Act?

1 MR. SANDLER: That would -- that would be the --
2 certainly the easiest remedy.
3 THE COURT: So are you familiar with this Industrial
4 Farming Hemp Act of 2007?
5 MR. SANDLER: I am, Your Honor. I don't believe that
6 it has been -- it has ever been -- yet been scheduled for
7 hearing or markup, and when -- consequently, we're not aware
8 that the Department of Justice or DEA has submitted any
9 testimony or position.
10 THE COURT: So have there been -- are you aware of
11 any lobbying efforts around the country to support that
12 measure, which to me seems like the easiest solution to the
13 problems that your clients face? I mean, the sole purpose of
14 that statute is to amend the definition of marijuana under the
15 Controlled Substances Act to specifically exclude the growing
16 of industrial hemp.
17 MR. SANDLER: Right. Clearly amending the law would
18 be the easiest -- I think the most unambiguous way to do it.
19 It's not an easy thing to get any law amended. There are also
20 other efforts around the country, certain extensive lobbying
21 efforts to have other states enact regimes similar to that of
22 North Dakota, but, of course, that would not solve the problem
23 unless the --
24 THE COURT: No, that was going to be my next
25 question. What problems are going to arise if other states

1 climb on board to what North Dakota has done and they define
2 industrial hemp differently than North Dakota, maybe containing
3 less than one percent or less than one percent THC or --
4 MR. SANDLER: We think that would raise a significant
5 factual issue. If it was -- if it was less than one percent,
6 then you're really talking about something that is -- that is
7 fungible with drug marijuana, and the legal arguments that
8 we've advanced in this case would not be valid in that
9 situation, but --
10 THE COURT: Who came up with the one-third -- or
11 three-tenths -- less than three-tenths of one percent? Is
12 there some scientific basis for that?
13 MR. SANDLER: There is, Your Honor. It's the --
14 THE COURT: Three-tenths of -- less than three-tenths
15 of one percent THC does not produce any hallucinogenic high or
16 it's not of any value for -- as far as a recreational drug
17 usage is concerned?
18 MR. SANDLER: Exactly, and that really is based on
19 the laws of the many other countries, particularly Canada,
20 which basically established that or slightly higher limit,
21 five-tenths of one percent, somewhere between three and
22 five-tenths of one percent.
23 THE COURT: But in North Dakota, where did they come
24 up with that, from Canada's definition of industrial hemp?
25 MR. SANDLER: From Canada's definitions and

1 definitions from European countries, which in turn are based on
2 the scientific consensus.
3 THE COURT: And all of them are consistent in terms
4 of using the same definition, namely that industrial hemp
5 contains less than three-tenths of one percent THC or --
6 MR. SANDLER: Some countries are slightly higher.
7 Three-tenths of one percent would be the lowest limit anywhere
8 in the world.
9 THE COURT: Do you know offhand what the plaintiff in
10 the *White Plume* case was growing, what THC content there was in
11 the marijuana that was being grown there? I mean, that was an
12 industrial hemp case.
13 MR. SANDLER: It was -- it was said to an be
14 industrial hemp case, but, of course, what's different in *White*
15 *Plume* is -- I don't know -- it's not clear from the record or
16 the district court or Eighth Circuit decision what the THC
17 content of that hemp was, but what we do know is that there was
18 no state regulation. It doesn't matter. Plaintiffs could have
19 said anything because there wasn't any way to check it. Here
20 there's a state regulation to enforce that -- that limit.
21 Turning to the jurisdictional issues raised by the
22 Government's motion to dismiss, basically most of the grounds
23 raised by the Government point in the same direction, which is
24 obviously they want Representative Monson and Mr. Hauge to wait
25 for the DEA to decide whether to grant these licenses, when the

1 entire point of this case is that no license is needed. And
2 that's not a proposition that the plaintiffs came up with.
3 That's what the North Dakota law says. It's a proposition that
4 the State itself has recognized and endorsed.
5 And that's why it's important to note and clarify the
6 record that these two farmers did not apply for a DEA license,
7 get impatient and give up. Basically what happened is that the
8 -- again, the State of North Dakota amended the law so that it
9 was no longer a requirement of the effectiveness of the state
10 license.
11 That being said, we know, based on DEA's own
12 position, that denial of the license, as Your Honor suggested
13 earlier, is a foregone conclusion. There's no final decision
14 in this case. DEA's own papers repeatedly make that clear. I
15 don't think they can have that both ways. They have not made a
16 decision on these -- on these applications, but as a logical
17 matter, when you look at what they've said within the four
18 corners of this litigation, just inferring from that and saying
19 this is two-and-a-half million marijuana plants and it's the
20 most dangerous and widely abused substance in the United States
21 and so forth, we believe the denial --
22 THE COURT: Oh, it sounds like they've prejudged the
23 merits of the application.
24 MR. SANDLER: Right. Exactly, but they have not made
25 a final decision about it, and for that reason we believe if we

1 went to the Eighth Circuit, original jurisdiction with claims
2 in this complaint, we believe that the Government would be
3 arguing there's no final agency action, so we can't obtain
4 relief from that court either. This is a situation where
5 there's no other way to obtain the relief except in this court,
6 and we believe that even the D.C. circuit then in deciding the
7 *Doe versus DEA* case would agree that the district court could
8 entertain this action.
9 As for standing, we have been unable to determine
10 that any of the authorities, as cited by the Government in
11 their papers, stands for the proposition that these farmers are
12 actually required to risk criminal prosecution in order to get
13 a ruling as to the applicability of this criminal statute.
14 There's no case that forced anyone to risk criminal prosecution
15 in order to do that.
16 The -- furthermore, the cases in which -- stand for
17 the proposition you don't have to do that are not limited to
18 the First Amendment area. For example, the NRA versus --
19 *National Rifle Association versus Magaw* case that the
20 Government cites was based on commerce clause and equal
21 protection grounds and held -- the Sixth Circuit case, that the
22 plaintiffs were there not required to risk criminal prosecution
23 in order to test a gun control statute.
24 And so for these -- for these reasons, Your Honor, we
25 suggest that the motion to dismiss submitted by the Government

1 should be denied and that the plaintiffs' motion for summary
2 judgment should be granted.
3 THE COURT: So tell me again how you get around
4 *United States versus White Plume*, Eighth Circuit decision out
5 of 2006.
6 MR. SANDLER: Right. We believe -- we believe the
7 difference in the *White Plume* case -- between this case and the
8 *White Plume* case is the existence of a state regulatory regime
9 that has these two critical elements of not permitting any part
10 of the plant to enter commerce other than those that Congress
11 has already determined should be exempt from federal law, and
12 also the imposition of a -- such a low limit on THC content as
13 a practical matter to make the plants themselves useless as
14 drug marijuana.
15 THE COURT: Is there any federal district court or
16 appellate court that has exempted industrial hemp from the
17 Controlled Substances Act --
18 MR. SANDLER: No, Your Honor.
19 THE COURT: -- as we sit here today?
20 MR. SANDLER: There's not. There has not been, and
21 again, that's, I think, what's unique about our situation here,
22 is that no state ever before has enacted a regulatory system
23 for cultivation of industrial hemp like this one.
24 THE COURT: Is there any court that has said the
25 cannabis -- that a cannabis plant that contains even the most

1 minimal levels of THC is exempt from the Controlled Substances
2 Act?
3 MR. SANDLER: No, not -- there is not.
4 THE COURT: So who was the force behind the
5 legislative change in North Dakota, do you know?
6 MR. SANDLER: The legislative -- the enactment of the
7 regime or the change in the law which --
8 THE COURT: Both. Both.
9 MR. SANDLER: Our understanding is that basically
10 there was legislation earlier in North Dakota going back to the
11 late nineties in which --
12 THE COURT: In 1999.
13 MR. SANDLER: Right. Exactly. The state university
14 was charged with -- North Dakota State University was charged
15 with trying to breed -- come up with essentially commercially
16 viable breeds of industrial hemp.
17 THE COURT: And it was after the passage of that
18 legislation in 1999 that NDSU submitted its application to the
19 DEA for a license --
20 MR. SANDLER: That's exactly --
21 THE COURT: -- to grow industrial hemp.
22 MR. SANDLER: Correct, for -- for research project.
23 THE COURT: Which is still pending.
24 MR. SANDLER: Which is still pending, but that the
25 force behind the legislation was essentially the state's

1 farmers, the agriculture sector looking for an opportunity to
2 engage in a crop which is environmentally better, which is more
3 lucrative, and essentially was -- it has -- widely recognized
4 to have a significant commercial future in the country if -- if
5 we could grow it here instead of importing the products of it
6 from Canada and elsewhere.
7 THE COURT: So you're in private practice in D.C.?
8 MR. SANDLER: Yes, Your Honor.
9 THE COURT: And how did you get involved in this
10 case?
11 MR. SANDLER: I got involved originally in
12 challenging -- was asked by the Hemp Industries Association to
13 represent them in the challenge to -- first, DEA's
14 interpretative rule and then DEA's final rules prohibiting the
15 -- basically the sale of hemp stalk, fiber, seed and oil that
16 contained any amount of THC if it was -- it was for human
17 ingestion. Those rules were -- that was a final determination
18 of a DEA, and we did challenge that in the Ninth Circuit, first
19 interpretative rule on the grounds that it was a substantive
20 rule and violated Administrative Procedure Act, and then the
21 final rule based on the actual interpretation of the law, and
22 the Ninth Circuit so ruled in both cases.
23 THE COURT: All right. Thank you, sir.
24 MR. SANDLER: Thank you, Your Honor.
25 THE COURT: Ms. Ertmer, any rebuttal? Any other

1 additional arguments that you wish to make? Or, Mr. Purdon, is
2 there anything you wanted to add to the mix?
3 MR. PURDON: Just, Your Honor, to answer a couple of
4 the questions you had, that I had the opportunity to be digging
5 in the notebook while Mr. Sandler was in the firing line. In
6 *White Plume* the tribal ordinance allowed the growth of --
7 defined industrial hemp as one percent or less, so that would
8 be three times the amount here in the North Dakota regulatory
9 scheme.
10 The DEA license at issue here is a one-year license.
11 Even if it's granted, they have to reapply every year.
12 And finally, as far as the impetus for this law, the
13 1999 legislation was passed by the State, signed by Governor
14 Schafer. The subsequent amendments to take away the need for a
15 DEA license was, of course, the testimony from Representative
16 Monson, obviously the North Dakota Ag. Commissioner, NDSU, and,
17 of course, was signed by Governor Hoeven, so that's -- those
18 are the only questions that I could think of to answer while
19 Mr. Sandler was up there. Thank you, Your Honor.
20 THE COURT: Ms. Ertmer.
21 MS. ERTMER: Just a couple.
22 THE COURT: Mr. Peterson, if you have anything to add
23 to the mix, you're welcome to speak as well.
24 MS. ERTMER: Just going back to standing just
25 briefly, Your Honor, plaintiffs have suggested that we cited no

1 case in which the plaintiffs were forced to risk prosecution as
2 opposed to having their claims immediately reviewed. And there
3 are several cases that we cited, Your Honor, that fall into
4 that category. One is the *National Rifle Association* case.
5 That case actually really nicely illustrates the point that
6 defendants are trying to make here. The Court in that case
7 divided the plaintiffs into several groups. The first were --
8 it was a challenge to a new regulation on semiautomatic guns.
9 THE COURT: Name of the case again is what?
10 MS. ERTMER: Sorry. *National Rifle Association*
11 *versus Magaw*. It's in the Sixth Circuit, cited in our papers.
12 THE COURT: Okay.
13 MS. ERTMER: The first group of plaintiffs, Your
14 Honor, were the gun dealers, pre-existing gun dealers who were
15 going to be required to immediately change their business
16 practices to comply with the new regulation. The Court did
17 find that this group had standing for the same reason that the
18 Supreme Court in *Abbott Labs* found that they had standing,
19 because they were forced to undergo costly compliance measures
20 in order to comply with the new regulation.
21 But the second group of plaintiffs in *National Rifle*
22 *Association,* Your Honor, were a group of individuals who merely
23 wished to engage in prohibited conduct in the future, and the
24 Court found that this second group of plaintiffs did not have
25 standing to challenge the law. Their fear of prosecution, even

1 if it prevented them from engaging in the prohibited conduct,
2 was not enough to confer standing.
3 So the Court divided the two groups of plaintiffs
4 based on those who were currently engaged in this business, are
5 going to have to change their business practices to comply with
6 the new law, and those who merely wished to engage in it in the
7 future. That's one example, Your Honor.
8 *San Diego County Gun Rights Committee versus Reno*, a
9 Ninth Circuit case, which we also cited in our papers; *Gun*
10 *Owners Action League versus Swift*, First Circuit, that's also
11 cited in the papers. And those are just a few examples of
12 instances in which courts have held these are not First
13 Amendment cases, and if the option is to -- or if the case is
14 simply one in which the plaintiffs wish to engage in prohibited
15 conduct, they need to -- they need to show a specific threat of
16 prosecution before they have standing to sue.
17 One final point on *White Plume* --
18 THE COURT: I'm just not convinced that these
19 individuals have to expose themselves to the risk of being
20 indicted and arrested and charged with a federal criminal
21 offense in order to challenge this statute in federal court.
22 MS. ERTMER: Your Honor, that is, I believe, the
23 holding of *National Rifle Association*. Like I said, I would
24 focus your attention on that second group of plaintiffs, and
25 also the Ninth Circuit case, *San Diego Gun Rights Committee*.

1 THE COURT: I'll read the cases.

2 MS. ERTMER: Pardon?

3 THE COURT: I will read the cases.

4 MS. ERTMER: Okay. Just as I was saying, one last
5 point on *White Plume*, the holding in *White Plume* did not in any
6 way depend on the amount of THC that was contained in the
7 plants that *White Plume* grew. *White Plume* in that case did
8 argue, just as plaintiffs do here, that because the THC content
9 was low enough, because the plants were not psychoactive, that
10 -- that it wasn't marijuana, that it wasn't regulated under the
11 Controlled Substances Act. And either because it was -- it was
12 marijuana or because it was a THC-containing substance, the
13 Eighth Circuit held that it was covered under the CSA. That's
14 all I have, Your Honor. Thank you.

15 THE COURT: Mr. Peterson, anything else?

16 MR. PETERSON: No, Your Honor.

17 THE COURT: All right. Mr. Sandler, anything else
18 you want to add?

19 MR. SANDLER: No, Your Honor.

20 THE COURT: All right. Well, I will take the matter
21 under advisement. I've carefully reviewed all of the briefs in
22 this case, but there's some other cases that have been
23 mentioned today that I do want to review, but I will take it
24 under advisement. I promise you that you will have a decision
25 before the end of the month, and I will be working on it as we

1 leave this courtroom.

2 And I am going to stay consideration of the

3 plaintiffs' motion for summary judgment. I think that the

4 first matter that needs to be addressed is the plaintiffs'

5 motion to dismiss, and however that's resolved, we'll move on

6 to the next hurdle of the case, so I don't think that anybody

7 is prejudiced by staying any of the other pending motions

8 before me. And again, I will get you something before the end

9 of the month.

10 Anything else, any other matters before me that --

11 motions before me that we can take care of or --

12 MR. SANDLER: No, Your Honor.

13 MS. ERTMER: I think that's it, Your Honor. Thank

14 you.

15 THE COURT: All right. Well, thank you all for the

16 briefs that have been submitted in this case. They are

17 excellent. Both parties have been well represented. We will

18 stand adjourned.

19 (Concluded at 11:03 a.m., the same day.)

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1 CERTIFICATE OF COURT REPORTER

2 I, Sandra E. Ehrmantraut, a Certified Realtime

3 Reporter,

4 DO HEREBY CERTIFY that I recorded in shorthand the

5 foregoing proceedings had and made of record at the time and

6 place hereinbefore indicated.

7 I DO HEREBY FURTHER CERTIFY that the foregoing

8 typewritten pages contain an accurate transcript of my

9 shorthand notes then and there taken.

10 Dated this 19th day of November, 2007.

11

12 Sandra E. Ehrmantraut

13 Certified Realtime Reporter

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