No. 07-1159

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STUDENTS FOR SENSIBLE DRUG POLICY FOUNDATION, on behalf of itself and its members; KRAIG SELKEN; NATHAN BUSH; ALEXIS SCHWAB, on behalf of themselves and all other similarly situated individuals,

Plaintiffs – Appellants

v.

MARGARET SPELLINGS, Secretary of the United States Department of Education, in her official capacity,

Defendant – Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, NORTHERN DIVISION

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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SUMMARY OF THE CASE

This case presents a constitutional challenge to the Aid Elimination Penalty, 20 U.S.C. § 1091(r), which, over the past seven years, has punished more than 200,000 students who have been convicted of minor drug crimes by stripping their ability to receive federal aid to attend college. Because this denial of student aid by the Department of Education ("DOE") is a second criminal punishment for a student who has already served a sentence imposed by the court, the Aid Elimination Penalty violates the Double Jeopardy Clause of the United States Constitution.

This appeal raises solely a discrete issue in the litigation of that claim: Whether the district court erred in dismissing Plaintiffs' complaint for failing to state a claim upon which relief could be granted by explicitly ignoring Plaintiffs' evidence regarding the Aid Elimination Penalty's legislative history, even though the Supreme Court has held that such facts are central to Plaintiffs' claim. Plaintiffs seek reversal of this erroneous order and a remand for the district court to consider the relevant evidence.

REQUEST FOR ORAL ARGUMENT

Plaintiffs respectfully request twenty minutes of oral argument for each party. Because this case has national significance and raises constitutional claims, oral argument would aid the resolution of this appeal.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs state that they do not have any parent corporations and that no publicly held corporation owns 10 percent or more of their stock.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action, alleging that a federal statute violates the United States Constitution, pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), 2201, and 2202.

This Court has jurisdiction under 28 U.S.C. § 1291. The district court issued an order granting Defendant's motion to dismiss Plaintiffs' claims on October 27, 2006. JA 126-41.[1] On October 30, 2006, the district court entered its final judgment dismissing the complaint. JA 142. Plaintiffs timely appealed the district court's order.

STATEMENT OF ISSUE

Whether the district court erred when, contrary to Supreme Court precedent, it dismissed Plaintiffs' Double Jeopardy claim by refusing to consider the Aid Elimination Penalty's full legislative history when assessing whether Congress intended the Penalty to be criminal punishment?

Hudson v. United States, 522 U.S. 93 (1997)

United States v. Enmons, 410 U.S. 396 (1973)

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)

U.S. Const. amend. V

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[1] Throughout this brief, Plaintiffs will abbreviate citations to the Joint Appendix as "JA," followed by a page number of the Joint Appendix. Plaintiffs will abbreviate citations to the Addendum to this brief as "Add.," followed by a page number of the Addendum.

20 U.S.C. § 1091(r)

21 U.S.C. § 862

STATEMENT OF THE CASE

This case presents a challenge to the unique punishment imposed by the Aid Elimination Penalty. Under this provision, students convicted of a drug offense—including a minor drug-possession offense—but virtually no other offenses, are automatically suspended from receiving federal financial aid.

Plaintiffs are three students whose eligibility for aid was suspended after they were convicted of possessing a small amount marijuana, as well as an organization whose members include such students. On behalf of a class of similarly situated students, Plaintiffs filed a complaint on March 22, 2006, in the District of South Dakota against the Secretary of the DOE, who administers the Aid Elimination Penalty. Plaintiffs alleged that the Penalty violates students' rights guaranteed by the Double Jeopardy Clause and Equal Protection Component of the Due Process Clause of the Fifth Amendment. They sought a declaration that the Penalty is unconstitutional, in addition to an injunction that would restore their eligibility for student aid.

On May 26, 2006, Plaintiffs filed motions for a preliminary injunction and class certification. Also on May 26, 2006, Defendant filed a motion to

dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). On October 27, 2006, the district court, explicitly refusing to consider Plaintiffs' significant body of evidence regarding Congressional intent for enacting the Aid Elimination Penalty, issued an order granting Defendant's motion and denying Plaintiffs' motions. The district court entered its final judgment dismissing the complaint for failure to state a claim upon which relief could be granted on October 30, 2006.

Plaintiffs appeal solely the portion of the lower court's order granting the motion to dismiss their Double Jeopardy claim. They seek reversal of this order on narrow grounds: That the Court should have considered, under controlling Supreme Court precedent, Plaintiffs' evidence when assessing whether Plaintiffs have stated a claim upon which relief could be granted. To that end, Plaintiffs ask this Court to remand the case to the district court to assess all of the evidence in the first instance.

STATEMENT OF FACTS

The Aid Elimination Penalty is the culmination of a decade of legislative efforts to criminally punish students who have been convicted of a drug offense. The Penalty initially appeared as part of the federal law that allowed judges, at their discretion, to rescind drug offenders' eligibility for student aid as part of their criminal sentence. A few years after passing that

law, Congress noticed that judges were not exercising their discretion to suspend student aid for these students, and therefore shifted the burden to the DOE to impose this punishment. In shifting responsibility to the DOE, the legislature was clear that it was enacting the Aid Elimination Penalty primarily for the same criminal-law reasons—retribution and deterrence—that it passed the original version of the Penalty. Although the Supreme Court has held that this legislative history can be highly relevant to whether the Penalty is the type of punishment that violates the Constitution, the district court, in granting Defendant's motion to dismiss, expressly ignored this evidence.

I. The Anti-Drug Abuse Act of 1988: The Precursor to the Aid Elimination Penalty.

Congress enacted the Higher Education Act of 1965 ("HEA"), 20 U.S.C. § 1070 *et seq.*, to provide educational opportunities to students who could not personally finance their education at universities and colleges, as well as at business, trade, and technical schools. 20 U.S.C. §§ 1002, 1070(a), 1091(a)(1), 1094(d). With the mounting costs of college tuition, Congress sought, through the HEA, to open up the college gates for all students who sought an education. JA 32 (stating that the HEA was intended to "open a new door for the young people of America. For them,

and for this entire land of ours, it is the most important door that will ever open—the door to education.”).

From 1965 through 1988, the DOE disbursed college aid regardless of a student’s criminal record. This changed, however, in 1988, when Congress, motivated to further punish drug offenders, enacted the Anti-Drug Abuse Act of 1988 (“1988 Act”), Pub. L. 100-690. A provision of the 1988 Act granted state and federal judges discretionary authority to suspend—as part of one’s criminal sentence—federal student aid to individuals convicted of a drug offense. 21 U.S.C. § 862.

More specifically, the 1988 Act provides that “[a]ny individual who is convicted of any Federal or State offense involving the possession [or distribution] of a controlled substance” may become ineligible to receive federal student aid for a certain period of time—the time period depending on whether the conviction was for possessing or distributing a controlled substance, and on whether it was a first, second, or third such offense. 21 U.S.C. § 862(a),(b). The 1988 Act authorizes judges to impose this penalty as part of the sentencing for the drug offense. *Id.* Finally, the Act allows a student to regain student aid prior to the prescribed time period of ineligibility if the student “completes a supervised drug rehabilitation program” or has attempted to gain admission to a drug rehabilitation

program, but was unable to do so because such a program was unavailable or the defendant was unable to pay for the program. 21 U.S.C. § 862(c).

<table>
<tr><th></th><th>Anti-Drug Abuse Act of 1988</th></tr>
<tr><td>Period of ineligibility</td><td>“Any individual who is convicted of any Federal or State offense involving the possession [or distribution] of a controlled substance” may be ineligible for:
<table>
<tr><td></td><td>Possession</td><td>Distribution</td></tr>
<tr><td>1st conviction</td><td>1 year</td><td>5 years</td></tr>
<tr><td>2nd conviction</td><td>5 years</td><td>10 years</td></tr>
<tr><td>3rd+ conviction</td><td>5 years</td><td>Indefinite</td></tr>
</table></td></tr>
<tr><td>Suspension of ineligibility upon completion of rehabilitation program</td><td>Allows student to receive aid prior to expiration of time periods above if the student satisfactorily completes a “drug rehabilitation program.”</td></tr>
</table>

There is no question that the 1988 Act was intended to criminally punish students convicted of drug crimes. Not only does the Act allow for the penalty to be imposed at the time of sentencing for the criminal act, but the legislators’ floor statements made it clear that their primary purposes were retribution and deterrence, the hallmarks of criminal punishment.

As for the Act’s punitive purpose, Senator Gramm, for instance, noted that “[t]his is punitive. Our objective is to say to somebody using drugs or selling drugs, ‘We are not going to put up with it. You are not going to be treated like a respected member of our society if you are out here selling people dope. . . .’” 134 Cong. Rec. S15,963-02 (1988). The floor debate for the 1988 Act is replete with similar, punitive-based statements. *See, e.g.*,

134 Cong. Rec. S15,963-02 (1988) ("[W]e have to have some punishment for users. We have to put a stamp of disapproval on this kind of behavior as a society."); 134 Cong. Rec. S15,963-02 (1988) ("[W]e are not going to tolerate their behavior. If you are using drugs, you will be subject to a penalty . . . . [M]ake no mistake about it. This amendment says to the people who are using drugs in this country, 'It is illegal to use drugs.' Do not think, because we do not have enough room to put you in prison, that you are going to get off scot free.")

The legislators also made clear that they passed the 1988 Act in order to deter drug use. Again, floor statements are instructive. The Act's sponsor, for example, stated: "I want some effective deterrence . . . . That is what this amendment is about. . . . [I]ts intent is clear." 134 Cong. Rec. S15,963-02 (1988). He added that the Anti-Drug Abuse Act of 1988 is "an effort to provide deterrence to the use of drugs in the first place." 134 Cong. Rec. S15,963-02 (1988).

II. Congress Attempts to Make Mandatory the Denial of Aid For Students Convicted of a Drug Offense.

Perhaps not surprisingly, courts were reluctant to invoke their authority to suspend student aid as part of an individual's sentence for a drug offense. In fact, for the first two years of the 1988 Act's existence, not a single judge nationwide suspended anyone's student aid. 136 Cong. Rec.

18,523 (1990). From 1990 onward courts suspended student aid in less than two out of one thousand eligible cases. JA 46. Rather than erect roadblocks to a college degree, courts instead exercised their discretion to criminally punish drug offenders in other ways.

Congress, frustrated that the judiciary was refusing to strip away students' financial aid, 136 Cong. Rec. 18,523 (1990), embarked on an eight-year campaign, led by Congressman Solomon, to make mandatory the discretionary punishment authorized by the 1988 Act. Beginning in 1990, the House of Representatives introduced twin bills on nearly an annual basis that would have required the mandatory denial of student aid for all people convicted of a drug offense.

These bills proposed two methods for achieving the same goal, namely, the denial of student aid for individuals convicted of a drug offense. The first set of bills, introduced on nearly an annual basis until the passage of the Aid Elimination Penalty, would have required courts to rescind student aid at the time of one's sentencing for a drug offense. *See, e.g.*, H.R. 5269, 101st Cong. §§ 2203, 5301 (1990); H.R. 1491, 102nd Cong. (1991); H.R. 383, 103rd Cong. (1993); H.R. 4197, 103rd Cong. § 103 (1994); H.R. 313, 105th Cong. (1997). For the final four of these five proposed bills, Congress would have retained virtually all of the language of the 1988 Act,

save the striking of "discretion of the court." *See, e.g.*, H.R. 4197, 103rd Cong. § 103 (1994). As with the 1988 Act, floor statements made in support of the proposed court-imposed student-aid penalty centered on retribution and deterrence:

- "[T]oday's bill is intended to impose some accountability on those who use controlled substances." 135 Cong. Rec. S9936-01, S9940 (1989).

- Stating the need "to reinforce the user-accountability laws in this country so that when somebody is convicted of a simple possession of narcotics, they will automatically lose their Federal benefits . . . . It is an important deterrent." 136 Cong. Rec. H8746-02, H8748 (1990).

- "A couple of years ago we passed a user-accountability law . . . in [the Anti-Drug Abuse Act of 1988]. Unfortunately . . . we wound up with provisions that allowed judges to make the decision on a case-by-case basis . . . and we do not have at the present time a very effective system of getting the user-accountability laws into effect dealing with simple possession . . . of narcotics. The provisions in this bill will result in automatic loss of Federal benefit upon conviction of a narcotics possession crime." 136 Cong. Rec. H8746-02, H8748-02 (1990).

- Decrying that users of controlled substances "get[] off scot-free. . . . [W]e can begin to send the message to illegal drug users that they are no longer immune . . . . [T]he way to do this is through user accountability." 137 Cong. Rec. E1480-01, E1480 (1991).

At the same time, with the same effect, and with the same purpose, Congress introduced bills on a regular basis that would have mandated the denial of student aid to drug offenders, but that would have transferred the authority to impose this penalty to the DOE. *See, e.g.,* H.R. 4106, 101st

Cong. (1990); H.R. 2116, 102nd Cong. (1991); H.R. 134, 104th Cong. (1995); and H.R. 88, 105th Cong. (1997). Again, these bills were materially identical to the 1988 Act, even borrowing much of the syntax from that Act. For example, the bill introduced in 1990 (H.R. 4106) provided as follows:

<table>
<tr><th></th><th>Proposed Aid Elimination Penalty of 1990</th></tr>
<tr><td>Period of ineligibility</td><td>"An individual student who has been convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance" shall be ineligible for:
<table>
<tr><th></th><th>Possession</th><th>Distribution</th></tr>
<tr><td>1st conviction</td><td>1 year</td><td>2 years</td></tr>
<tr><td>2nd conviction</td><td>2 years</td><td>Indefinite</td></tr>
<tr><td>3rd+ conviction</td><td>Indefinite</td><td>Indefinite</td></tr>
</table></td></tr>
<tr><td>Suspension of ineligibility upon completion of rehabilitation program</td><td>Allows student to receive aid prior to expiration of time periods above if the student satisfactorily completes a "drug rehabilitation program."</td></tr>
</table>

As with the 1988 Act and the proposed bills that would have required courts to rescind student-aid eligibility for drug offenders as part of their sentence, the floor debate for this second track of proposed bills was filled with references to retribution and deterrence:

- "Let me again emphasize the fact that this amendment is targeted at the casual drug users. . . . [T]hey should be held accountable." 136 Cong. Rec. 18,522 (1990).

- "[W]e can begin to send the message to illegal drug users that they are no longer immune . . . ." 137 Cong. Rec. 9,579 (1991).

- "Roughly 75 percent of all illegal drug use can be attributed to casual drug users. Many of these users are students who are rarely disciplined . . . ." 138 Cong. Rec. 7,236 (1992).
- "[I]nvolvement with illegal drugs has clear consequences. We must increase the social and legal costs of illegal drug consumption." 141 Cong. Rec. 592 (1995).
- "That is a lot tougher than the National Football League, because one of those players could be arrested today and they will be playing next Sunday." 144 Cong. Rec. H9151-02, H9155 (1998).

These quotations are representative of the vast majority of floor statements by the legislators who supported the Aid Elimination Penalty. Nearly all of the statements indicated that the Aid Elimination Penalty was designed to increase deterrence, to impose "accountability," and/or to exact retribution against those convicted of drug offenses. *See, e.g.*, 138 Cong. Rec. H6091-01, H6108 (1992) (noting that the Aid Elimination Penalty is directed toward making the "social and economic penalties attached to drug use . . . intolerable"); 137 Cong. Rec. 9,579 (1991) ("[I]t is high time we address the issue of user accountability"); 136 Cong. Rec. 18,522 (1990) (emphasizing that "students have to pay . . . penalties" for their drug offenses).

As it considered these bills—the precursors to the Aid Elimination Penalty—Congress was well aware that it had already given judges the discretionary authority to rescind student aid of those convicted of drug

offenses, and expressed dissatisfaction with the fact that judges were not exercising their authority to strip student-aid eligibility at the time of sentencing. Discussing the need to enact the Aid Elimination Penalty, Congress repeatedly referred to courts' unwillingness to do so at the time of sentencing. 136 Cong. Rec. 18,523 (1990) (proposing the legislation because the "backlog of drug related cases in our courts [means that] casual drug users face minimal sentencing, if any"); 136 Cong. Rec. 18,522 (1990).

Speaking in opposition to such a proposal, Representative Williams noted:

> [C]urrent law [the Anti-Drug Abuse Act of 1988] says that a student may be denied eligibility for any student financial aid, but at the discretion of the court, to be decided on a case-by-case basis. . . . We now allow the courts in their discretion on a case-by-case basis dealing with individual students to decide whether to add this punishment also along with the punishment that the student receives. The gentleman from New York [Mr. Solomon] would have this Congress simply establish by statute that anyone convicted of possession or drug use, no matter how casual, shall lose their right to student financial aid. So we would in effect place a cul-de-sac on the educational opportunity road for anyone so convicted.

136 Cong. Rec. 18,522 (1990). Other Representatives also discussed the proposal in the context of the pre-existing punishment scheme:

> The amendments we passed in 1988 . . . before we have any evidence of their effectiveness, the amendment offered by the gentleman from New York would establish a different set of rules for one class of Federal benefits—student aid programs. Regrettably, the amendment would eliminate, entirely, judicial

> discretion to determine whether denial of student aid is an appropriate sanction in a particular case.

136 Cong. Rec. 18,523 (1990). In support of an earlier version of the Aid Elimination Penalty, the bill's sponsor, Representative Solomon, was explicit about the need for the law, lamenting the fact that "[t]here has not been one court that has denied one student any aid due to drug possession or sale as yet." 136 Cong. Rec. 18,523 (1990).[2]

Two clear strands run throughout the history of the dual-tracked proposed legislation from 1990-1998: First, Congress was attempting to make mandatory the denial of student-aid eligibility for drug offenders because the judiciary was refusing to exercise their authority to impose this penalty at the time of sentencing. Second, whether the penalty would be exacted by the judiciary or the DOE, Congress' primary purpose in stripping student aid for drug offenders was retribution and deterrence.

The Aid Elimination Penalty was ultimately enacted by § 483 of the Higher Education Amendments of 1998, Pub. L. 105-244. Nearly identical

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[2] In the district court, Defendant attempted to explain away the judiciary's non-use of the 1988 Act between 1988 and 1990 by noting that the Act's implementing regulations were not promulgated until 1990. As Plaintiffs' argument concerns Congressional intent for proposing the new, mandatory laws, however, Defendant's response does not rebut Plaintiffs' central point: Congress proposed these laws out of its perceived concern that courts were not adequately punishing students by refusing to exercise the authority granted to them pursuant to the 1988 Act.

to the legislation proposed from 1990 through 1998, the Aid Elimination Penalty that passed in 1998 provided as follows:

<table>
<tr><th></th><th>Aid Elimination Penalty</th></tr>
<tr><td>Period of ineligibility</td><td>“A student who has been convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance”[3] shall be ineligible for:
<table>
<tr><th></th><th>Possession</th><th>Distribution</th></tr>
<tr><td>1st conviction</td><td>1 year</td><td>2 years</td></tr>
<tr><td>2nd conviction</td><td>2 years</td><td>Indefinite</td></tr>
<tr><td>3rd+ conviction</td><td>Indefinite</td><td>Indefinite</td></tr>
</table></td></tr>
<tr><td>Suspension of ineligibility upon completion of rehabilitation program</td><td>Allows student to receive aid prior to expiration of time periods above if the student satisfactorily completes a “drug rehabilitation program.”</td></tr>
</table>

The text, effect, and primary purposes of the Aid Elimination Penalty are nearly identical to the 1988 Act and the unenacted, proposed bills—discussed above—that were introduced between 1990 and 1998. In fact, the sponsor of the Aid Elimination Penalty, Representative Souder, reminded his colleagues that they had considered similar proposals before and that “the gentleman from New York (Mr. Solomon) has been the pioneer and the leader with this.” 144 Cong. Rec. H2510-08, H2580 (1998). Another representative noted that the Aid Elimination Penalty was “long championed by the gentleman from New York (Mr. Solomon).” 144 Cong. Rec. H2860-

[3] Congress amended the Aid Elimination Penalty in 2006 so that it now applies only to students who were receiving student aid at the time of their offense. The text of the statute remained the same in all other respects.

03, H2871 (1998); *see also* 144 Cong. Rec. H2510-08, H2516 (1998) ("This provision is based on an amendment offered by Mr. Solomon in 1992 . . . .").

Furthermore, the small amount of floor debate in 1998 (and 2006, when the Penalty was re-enacted) regarding the Aid Elimination Penalty compels the conclusion that retribution and deterrence were the primary motivation for the law. *See, e.g.*, 144 Cong. Rec. H9151-02, H9155 (1998) (approvingly noting that the Aid Elimination Penalty "is a lot tougher than the National Football League, because one of those players could be arrested today and they will be playing next Sunday"); 144 Cong. Rec. H2510-08, H2580 (1998) (stating that the Aid Elimination Penalty "will actually make the underlying amendment that we had in committee even stronger and put teeth in that"); H.R. Report. No. 109-231 (2006) (noting that the Aid Elimination Penalty was intended "to serve as a deterrent to prevent drug offenses"). In light of the text and legislative history, the 1988 Act and the bills proposed from 1990 through 1998 were plainly predecessor bills to the Aid Elimination Penalty.[4]

[4] Lest there be any doubt that the 1988 Act and the bills proposed between 1990 and 1997 were the Aid Elimination Penalty's predecessor statutes, Defendant conceded as much in the district-court briefing, calling the proposed 1990 bill "a previous, unenacted version of [the Aid Elimination Penalty]." JA 21-22 (n.4).

III. The Decision Below

Plaintiffs alleged that the Aid Elimination Penalty violated both the Equal Protection Component of the Due Process Clause and the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Add. 3. On the same day in the district court, Plaintiffs filed motions for class certification and a preliminary injunction, and Defendant filed a motion to dismiss for failure to state a claim upon which relief could be granted. JA 1. By published order, the district court denied Plaintiffs' motions and granted Defendant's motion to dismiss both claims. Add. 1-16. The court then entered judgment dismissing Plaintiffs' complaint. JA 142.

When considering Plaintiffs' Double Jeopardy claim, the district court applied the two-part inquiry outlined in *Hudson v. United States*, 522 U.S. 93 (1997). Add. 7-16. First, the court considered whether Congress intended the Aid Elimination Penalty to be a criminal penalty, concluding that it did not. Add. 8-14. Second, the court considered whether the statutory scheme was so punitive in effect as to transform it into a criminal penalty, again answering in the negative. Add. 14-16.

The crux of Plaintiffs' Double Jeopardy argument was that the rich and unique legislative history of the Aid Elimination Penalty, including its various predecessor bills, demonstrates that the Penalty is the type of

punishment that violates the Double Jeopardy Clause. Add. 9. At the very least, Plaintiffs argued in opposition to Defendant's motion to dismiss, there is a conceivable set of facts that would render the Penalty to be the type of punishment that would violate the Double Jeopardy Clause. Add. 7-9.

Although Defendant herself cited prior legislative history in her motion to dismiss in order to bolster her interpretation of Congressional intent, the district court simply refused to consider this history—stating "I reject this contention outright"—when it evaluated the intent behind the Aid Elimination Penalty. Add. 9. The district court then granted Defendant's motion to dismiss for failure to state a claim upon which relief could be granted. Add. 16.

SUMMARY OF ARGUMENT

This is one of the rare cases where a district court's opinion conflicts with controlling Supreme Court precedent. In dismissing Plaintiffs' Double Jeopardy claim, the lower court refused to consider the Aid Elimination Penalty's full legislative history that Plaintiffs cited in support of their argument—facts that the Supreme Court has held can be crucial for the Double Jeopardy analysis. Accordingly, the district court's order should be reversed and the case remanded for the court to consider all of the facts in the light most favorable to Plaintiffs.

Not even Defendant argued below that it would be erroneous to rely upon this legislative history. Rather, the district court, without citing any cases in support of this part of its ruling and without scheduling oral argument, held as a matter of law that this history was irrelevant. Because, as the Supreme Court has stated, this history is quite relevant to Plaintiffs' claim, this Court should reverse the lower court's order granting Defendant's motion to dismiss for failure to state a claim upon which relief could be granted.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's grant of a motion to dismiss. *See, e.g.*, *Kottschade v. City of Rochester*, 319 F.3d 1038, 1040 (8th Cir. 2003).

When ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, "[a]ll facts alleged in the complaint are taken as true and construed in the light most favorable to the plaintiff." *Id*; *see also Whisman v. Rinehart*, 119 F.3d 1303, 1308 (8th Cir. 1997). The motion to dismiss is not an opportunity for the court to weigh facts, but instead to assess if there is any conceivable set of facts that would render the plaintiff's claim meritorious. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) ("[A] complaint should not be dismissed for failure to state a claim unless it

appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.") (emphasis added); *In re Canadian Import Antitrust Litig.*, 470 F.3d 785, 788 (8th Cir. 2006). A motion to dismiss should be granted "only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995).

ARGUMENT

I. THE DISTRICT COURT ERRED BY REFUSING TO CONSIDER THE AID ELIMINATION PENALTY'S FULL LEGISLATIVE HISTORY WHEN ASSESSING CONGRESSIONAL INTENT FOR ENACTING THE LAW.

Plaintiffs contend that the Aid Elimination Penalty[5] is an unconstitutional punishment due to Congress' primary intent in passing this law. As Plaintiffs argued in the court below, their evidence of intent is based largely on the legislative history of the Penalty. Even though the Supreme Court has held that such legislative history can establish the requisite unconstitutional intent, the court below explicitly refused to consider Plaintiffs' evidence. In granting Defendant's motion to dismiss

[5] Plaintiffs call the challenged law a "penalty" because Congress itself has referred to it as a "penalty." *See* JA 29; 136 Cong. Rec. 2616 (1990).

without considering Plaintiffs' relevant evidence, the district court clearly erred.

A. Historical Context and Legislative History Are Especially Important When Evaluating a Double Jeopardy Claim, Which Turns on Congress' Actual Intent in Passing the Challenged Law.

The touchstone of Double Jeopardy claims is the primary congressional intent for enacting the law: Did Congress intend the sanction at issue to be a criminal penalty or a civil disability? Naturally—and as Supreme Court precedent recognizes—it is imperative for a reviewing court to consider the full legislative history of a statute when assessing whether it violates the Double Jeopardy Clause.

The Double Jeopardy Clause provides three fundamental guarantees: "[It] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165 (1977). In this case, Plaintiffs invoke the final of these protections and allege that the Aid Elimination Penalty imposes an unconstitutional second punishment for a drug offense.

Only criminal punishments, and not the imposition of civil disabilities, implicate the Double Jeopardy Clause. *See, e.g.*, *Hudson*, 522 U.S. at 99. Whether a particular sanction is a criminal punishment or a civil

disability—the crux of the dispute between the parties in the case at bar—is a factual matter that depends on the statute at issue and the sanction it imposes.

It is well established that, when determining whether a statute imposes criminal punishment, a court should first consider legislative intent. This is because "the question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction." *United States v. Ward*, 448 U.S. 242, 248 (1980); *see also Hudson*, 522 U.S. at 99 ("Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction."). When assessing whether Congress intended to impose criminal punishment, a court should consider the legislature's primary purposes for enacting a particular statute. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169-70 (1963) (discussing the "primary function" sought to be served by the law in question); *Cortinas v. United States Parole Comm'n*, 938 F.2d 43, 47 (5th Cir. 1991) (per curiam) (same). When evaluating Congress' primary purpose, a court should be mindful that retribution and deterrence are the hallmarks of criminal punishment. *See, e.g.*, *Hudson*, 522 U.S. at 99 (noting that retribution and deterrence are the "traditional aims of punishment") (quoting *Kennedy*, 372 U.S. at 168); *Trop v. Dulles*, 356 U.S. 86, 96 (1958) ("If the statute imposes a disability for the

purposes of punishment—to reprimand the wrongdoer, to deter others, etc., it has been considered penal.”). Moreover, it is Congress’ actual purpose, not merely any conceivable purpose, that is relevant to the inquiry.[6] *See, e.g.*, *Trop*, 356 U.S. at 96 (referring to the legislature’s “evident purpose”); *id.* at 109-10 (Brennan, J., concurring) (rejecting government counsel’s assertions regarding the legislative purposes of the act in question and finding that the statute was enacted for the primary purpose of punishment).

Accordingly, context matters enormously for whether a statute is an unconstitutional punishment. As the Supreme Court has noted, “each case has turned on its own highly particularized context.” *Flemming v. Nestor*, 363 U.S. 603, 616 (1960); *see also Kennedy*, 372 U.S. at 170 n.30 (holding that a statute imposing the loss of citizenship for certain conduct was an unconstitutional punishment, while distinguishing cases that upheld statutes imposing the loss of citizenship for certain other conduct because Congress enacted the latter set of statutes for non-punitive reasons). Yet it is the

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[6] This focus on legislative intent means that Double Jeopardy claims must be analyzed very differently from Equal Protection claims proceeding under the rational-basis doctrine. Under rational-basis review, unlike Double-Jeopardy review, courts may consider any conceivable purpose or post-hoc rationalization for the legislation. *See, e.g.*, *Geach v Chertoff*, 444 F.3d 940, 946 (8th Cir. 2006).

highly particularized context of the Aid Elimination Penalty that the court below refused to consider.

It is unsurprising, given the factual nature of the inquiry, that most all Double Jeopardy claims are decided on motions other than motions to dismiss. For example, of the 18 cases on which Defendant relied for arguing before the district court that Congress neither intended nor effectively imposed punishment, 17 were decided on motions other than motions to dismiss. *See, e.g., Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841 (1984) (permanent injunction); *Turner v. Glickman*, 207 F.3d 419 (7th Cir. 2000) (summary judgment); *United States v. Lippert*, 148 F.3d 974 (8th Cir. 1998) (summary judgment); *Greenwell v. Walters*, 596 F. Supp. 693 (M.D. Tenn. 1984) (summary judgment). The only such case cited by Defendant where the district court granted the government's motion to dismiss, *Jones v. Heckler*, 774 F.2d 997 (10th Cir. 1985) (per curiam), was a *pro se* prisoner action in the Tenth Circuit. If, as perhaps was the case in the *pro se* action, plaintiff's claim is utterly unsupportable, then it might be appropriate to dismiss the complaint for failure to state a claim upon which relief could be granted. Where, however, plaintiff has raised at least a potentially colorable Double Jeopardy claim, it should not be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

B. Supreme Court Precedent Recognizes That Courts Should Consider The Full Legislative History of a Statute, Including its Predecessor Statutes, When Assessing the Congressional Intent for Passing the Challenged Statute.

Before the district court, Plaintiffs provided a history of the Aid Elimination Penalty to demonstrate that Congress intended the Penalty to serve the purpose of criminal punishment. Rather than consider the Aid Elimination Penalty in this proper context, however, the district court explicitly chose to ignore this extensive legislative history. The lower court's analysis conflicts with controlling Supreme Court precedent in an analogous case, in addition to the approach adopted by numerous other courts, in various contexts, in ascertaining Congress' intent in passing challenged statutes.

1. Controlling Supreme Court Case Law Dictates That the Lower Court Should Have Considered The Aid Elimination Penalty's Full Legislative History.

The lower court's order ignores the Supreme Court's decision in *Kennedy*, which explicitly notes the importance of reviewing the legislative history of prior, similar statutes when assessing whether an existing statute imposes unconstitutional punishment. In *Kennedy*, the issue was whether a statute revoking the citizenship of a person who left the United States to avoid the draft during wartime imposed unconstitutional criminal

punishment. 372 U.S. at 163-64. Assessing whether Congress intended the statute to impose criminal punishment, the *Kennedy* Court conducted a searching review of "*the legislative history and judicial expression with respect to every congressional enactment relating to the provisions in question dating back to 1865*." *Id.* at 167 (emphasis added); *see also id.* at 170-79. The Court noted that, for purposes of determining whether the legislature had a punitive intent in passing the statute in question, reviewing legislation that preceded the challenged statute was "worth a volume of logic." *Id.* at 169. This history, the Court then determined, "compels a conclusion that the statute's primary function is to serve as an additional penalty," in violation of the Constitution. *Id.*

The Supreme Court's approach in *Kennedy* stands in stark contrast to that of the district court in this case. Although the *Kennedy* Court was construing provisions enacted as part of the Immigration and Nationality Act of 1952, it closely considered the legislative history of similarly worded predecessor legislation all the way back to 1865. In contrast, the district court in this case simply refused to consider any legislative history of closely related enacted and unenacted predecessor bills. *See* Add. 9. This was clear error that requires reversal of the order dismissing Plaintiffs' complaint.

2. The Lower Court's Analysis Breaks With a Strong Tradition Of the Judiciary Reviewing Predecessor Bills When Attempting to Ascertain Congress' Intent in Enacting a Challenged Statute.

Even if the lower court's analysis had not conflicted with Supreme Court precedent governing how to discern whether a challenged statute was intended to be unconstitutional punishment, the lower court parted with the way that courts often ascertain Congressional intent in other contexts. For in such cases, courts have adopted the *Kennedy* approach of reviewing a challenged statute's predecessor bills—whether enacted or unenacted—to understand Congress' motives for passing the statute.

The Supreme Court, in *United States v. Enmons*, 410 U.S. 396 (1973), considered whether the Hobbs Act, which makes it a federal crime to obstruct interstate commerce by robbery or extortion, reached the use of violence to achieve legitimate union objectives. In arriving at its decision, the Court gave significant weight to the legislative history of an unenacted predecessor bill that was considered by the 78th Congress—before the 79th Congress enacted the statute at issue. *Enmons*, 410 U.S. at 402-04. While the dissent contested the relevance of the legislative history of the predecessor bill, *see id.* at 413-18 (Douglas, J. dissenting), the majority, in response, stated that legislative history "with respect to [the predecessor

bill], which passed only the House, [is] wholly relevant to an understanding of the Hobbs Act, since the operative language of the original bill was substantially carried forward into the Act," *id.* at 405 n.14 (majority opinion) (internal citation omitted). Further, in a passage that is directly applicable to the resolution of Defendant's motion to dismiss in the case at bar, the majority wrote: "Surely an interpretation placed by the sponsor of a bill on the very language subsequently enacted by Congress cannot be dismissed out of hand, as the dissent would have it, simply because the interpretation was given two years earlier." *Id.*

Similarly, in *Kennedy*, discussed *supra* Part I.B.1, the Supreme Court relied heavily on the legislative history of predecessor legislation. 372 U.S. at 167-69. Explaining this approach, the Court wrote:

> The relevance of such history in analyzing the character of a present enactment is illustrated by the Court's approach in *Helwig v. United States*, 188 U.S. 605, 613-619 [(1903)] . . ., wherein at considerable length it reviewed and relied upon the character of previous relevant legislation in determining whether the statute before it, which imposed an exaction upon importers who undervalued imported goods for duty purposes, was a penalty.

Kennedy, 372 U.S. at 183 n.35.

Of course, *Kennedy* and *Helwig* are particularly apposite because the Court was considering whether, as in the case at bar, the relevant legislation imposed an unconstitutional penalty. However, *Kennedy's* common-sense

approach to ascertaining Congressional intent jibes not only with *Helwig* and *Enmons*, but also with dozens of other opinions, including opinions from this Court. *See*, *e.g.*, *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 654-55 (8th Cir. 2003) (citing hearings on predecessor bills and noting that the legislative history of the statute in question "predates the passage of [the statute]"); *United States v. Brings Plenty*, 188 F.3d 1051, 1054 (8th Cir. 1999) (per curiam); *United States v. Field*, 62 F.3d 246, 249 (8th Cir. 1995) (approving of sister courts' interpretations of the statute in dispute, which interpretations "relied on legislative history discussing a similar provision in an earlier bill"); *United States v. Ellis*, 949 F.2d 952, 953-54 (8th Cir. 1991) (citing a Senate Report for an unenacted predecessor bill as relevant legislative history of the statute in question); *see also Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 478 (1992) ("[T]he Board erred in relying on the purported lack of legislative history showing an explicit intent to reject the *O'Leary* [*v. Southeast Stevedoring Company*, 7 BRBS 144 (1977), *aff'd mem.*, 622 F.2d 595 (9th Cir. 1980)] decision. . . . [T]he legislative history of predecessor bills to the eventual 1984 enactment do indicate an intent to overturn *O'Leary*."); *Northpoint Tech., Ltd. v. F.C.C.*, 412 F.3d 145, 152 (D.C. Cir. 2005); *Henderson v. I.N.S.*, 157 F.3d 106, 116 (2d Cir. 1998) (citing a committee report of an unenacted predecessor bill);

In re Assets of Martin, 1 F.3d 1351, 1360 n.9 (3d Cir. 1993) ("Although Senate Report 97-520 predated the enactment of the substitute assets provision by some four years, it remains valid legislative history for determining the provision's meaning."); *Bolden v. Blue Cross & Blue Shield Ass'n*, 848 F.2d 201, 209 n.4 (D.C. Cir. 1988); *Alaska v. Lyng*, 797 F.2d 1479, 1484 (9th Cir. 1986) (citing *Enmons*); *Am. Fin. Servs. Ass'n v. F.T.C.*, 767 F.2d 957, 989-90 (D.C. Cir. 1985); *Katharine Gibbs Sch. (Inc.) v. F.T.C.*, 612 F.2d 658, 667 (2d Cir. 1979); *Cat Run Coal Co. v. Babbitt*, 932 F. Supp. 772, 780 n.15 (S.D.W.Va. 1996); *Ameritech Corp. v. United States*, 867 F. Supp. 721, 726 (N.D. Ill. 1994) (noting that the Government urged the court to interpret a statute by relying, in part, on a committee report for a "predecessor bill [that] died in the United States Senate"); *United States v. Hunter*, 843 F. Supp. 235, 247 (E.D. Mich. 1994); *Tenn. v. Herrington*, 626 F. Supp. 1345, 1359 (M.D. Tenn. 1986); *Am. Health Prods. Co., Inc. v. Hayes*, 574 F. Supp. 1498, 1506 (S.D.N.Y. 1983) ("The piece of legislative history most strongly supporting the government's interpretation appears in the report of the Commerce Committee which accompanied S. 2800, one of the early predecessor bills."); *United States v. Md.*, 488 F. Supp. 347, 357-58 (D. Md. 1980). Overwhelming authority rejects the district court's analysis in this case.

There are many reasons why a court might consider the legislative history of predecessor legislation. For obvious reasons, prior legislative history is most useful when predecessor bills contained language that is very similar to the relevant language in the enacted legislation. *See*, *e.g.*, *Enmons*, 410 U.S. at 404 n.14; *Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1347 n.1 (Fed. Cir. 2001); *Brings Plenty*, 188 F.3d at 1054. For example, in *Brings Plenty* this Court cited floor statements made by the "sponsor of an earlier bill containing nearly identical provisions," finding that these statements provided "strong support" for the court's interpretation of the statute at issue. 188 F.3d at 1054.

Furthermore, the legislative history of predecessor bills is particularly relevant when Congress explicitly refers to its earlier deliberations while discussing the final legislation. *See Enmons*, 410 U.S. at 404 n.14. Clearly, if Congress refers to its earlier deliberations, then these deliberations were on the minds of the legislators, which is important when the legal analysis rests on Congressional intent.

The consideration of prior legislative history is just a specific example of the general rule that legislation should be understood in its proper historical context. As the Supreme Court has noted: "[I]n determining the legislative purpose of a statute, the Court has also

considered the historical context of the statute and the specific sequence of events leading to passage of the statute." *Edwards v. Aguillard*, 482 U.S. 578, 595 (1987) (internal citation omitted). By refusing to consider the Aid Elimination Penalty in its proper context, as defined in opinions from the Supreme Court, this Court, and other courts around the country, the district court erred in its approach to ascertaining Congress' intent in enacting the Penalty.

C. The Was No Basis To Ignore the Full Historical Context of the Aid Elimination Penalty.

Notwithstanding the judicial authority supporting Plaintiffs' approach to understanding the Congressional intent behind the Aid Elimination Penalty, the lower court explicitly refused to consider the Penalty's full, rich legislative history. It did so despite the following: (1) all of the aforementioned reasons for considering predecessor statutes are particularly apt with regard to the Aid Elimination Penalty; (2) Defendant never argued in the court below that it would be improper to consider this full legislative history; and, in fact, (3) Defendant herself cited from this prior legislative history in briefing before the district court, admitting that it is proper to consider the Penalty's predecessor statutes. Accordingly, it would have been particularly appropriate for the lower court to have considered the Penalty's full legislative history.

Despite overwhelming authority to the contrary, the district court dismissed the relevance of prior legislative history with the following paragraph:

> Plaintiffs spent the greater portion of at least three briefs setting forth the legislative history of various other laws or proposed laws eliminating eligibility for federal student aid benefits beginning in 1990. Plaintiffs contend that these laws, most of which failed to pass, were the precursor to § 1091(r) and, therefore, the legislative history in conjunction with the prior proposed legislation is relevant. I reject this contention outright. Again, plaintiffs are attempting to impose some form of *stare decisis* on Congress.

Add. 9. This brief passage, without any citations for support, is a surprisingly clear, blanket refusal to consider Plaintiffs' evidence and arguments.

To understand the district court's reference to *stare decisis*, it is necessary to review the court's earlier dismissal of Plaintiffs' claim for a violation of the Equal Protection Clause. Before the district court, Plaintiffs contended that, when conducting rational-basis review under the Equal Protection Clause, the court should consider whether the Aid Elimination Penalty is rationally related to the broader goals of the HEA, which Congress amended to include the Penalty. The district court, rejecting this argument, stated that, if accepted, Plaintiffs' analysis "would constrict the ability of all future legislatures to add to or change a statute once enacted."

Add. 5. The court added that "Congress is not subject to a legislative form of *stare decisis*." *Id.* In that scenario, the lower court was stating, in other words: There is no statutory *stare decisis* requiring that new legislation be rationally related to the goals of prior legislation. As a response to this part of Plaintiffs' Equal Protection claim, the lower court may have raised a cogent point.[7]

In response to Plaintiffs' Double Jeopardy arguments, however, the district court's reference to *stare decisis* is not defensible. Plaintiffs were not suggesting that Congress was necessarily *bound* in any way by prior legislative efforts. Rather, Plaintiffs pointed out that the history of these efforts is relevant to understanding Congress' purpose when it finally passed the Aid Elimination Penalty. In essence, Plaintiffs sought to do no more that evaluate the relevant legislation in its proper historical context, just as the Supreme Court did in *Kennedy*. The district court was wrong to dispatch with this effort outright; as shown in the previous section, it is common—indeed, sometimes necessary—for courts to consider the legislative history of predecessor bills.

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[7] Though they maintain that the Aid Elimination Penalty is thoroughly irrational and counterproductive legislation, Plaintiffs do not appeal the dismissal of their Equal Protection claim.

Such legislative history is particularly relevant in this case, where it is impossible to properly understand Congress' purpose in enacting the Aid Elimination Penalty without considering its earlier enacted and unenacted predecessor bills. Even Defendant conceded as much in the district court, where she called the bill proposed in 1990 "a previous, unenacted version of [the Aid Elimination Penalty]," and cited the floor statements in support of that bill as evidence of Congressional intent for enacting the Aid Elimination Penalty in 1998. JA 21-22 (n.4).

Furthermore, all of the factors supporting consideration of prior legislative history are present in this case. Perhaps most importantly, the predecessor bills ignored by the district court contained nearly identical language to that which was finally passed in the Aid Elimination Penalty. *See supra* pp. 4-14.[8] Accordingly, the history of these bills is highly relevant to understanding Congress' purpose in passing the Aid Elimination

[8] To the extent that the 1988 Act operates differently from the Aid Elimination Penalty, the latter is *more* punitive than the discretionary sentencing regime. The Aid Elimination Penalty, after all, (1) imposes mandatory punishment, and (2) does not provide an opportunity to restore aid eligibility to students who are unable to afford or locate rehabilitation programs. *Compare* 20 U.S.C. § 1091(r)(2), *with* 21 U.S.C. § 862(c). The latter point is particularly important, as rehabilitation programs are often either not available or are prohibitively expensive, sometimes exceeding the cost of a semester of college tuition. JA 124-25.

Penalty. *See, e.g.*, *Enmons*, 410 U.S. at 404 n.14; *Brings Plenty*, 188 F.3d at 1054.

Additionally, the legislators' floor statements in support of the Aid Elimination Penalty were often similar to those echoed in support of its predecessor bills. *See supra* pp. 6-15. These statements likewise evinced a legislative focus on deterrence and retribution.

Furthermore, Congress made explicit reference to the predecessor bills when it debated the Aid Elimination Penalty. *See Enmons*, 410 U.S. at 404 n.14 (considering the legislative intent of an earlier, unenacted bill where "congressional debates on the Hobbs Act in the 79th Congress repeatedly referred to the legislative history of the original bill"). The House sponsor of the Aid Elimination Penalty, Representative Souder, noted:

> This amendment, to go through some of the history, has been in our bill before coming through the House, the full underlying amendment that came through committee before this adjustment, and my colleague and friend, the gentleman from New York (Mr. Solomon) has been the pioneer and the leader with this.

144 Cong. Rec. H2510-08, H2580 (1998). Nor was Representative Souder alone in acknowledging that the Aid Elimination Penalty emerged out of Representative Solomon's efforts. For example, Representative Goodling likewise noted that the "provision is based on an amendment offered by Mr. Solomon in 1992, which was accepted by the House." 144 Cong. Rec.

H2510-08, H2516 (1998); *see also* 144 Cong. Rec. H2860-03, H2871 ("[W]e adopted the amendment offered by the gentleman from Indiana (Mr. Souder) and long championed by the gentleman from New York (Mr. Solomon) . . . ."). These comments certainly bolster Plaintiffs' argument that the Aid Elimination Penalty was the culmination of a years-long effort, led by Representative Solomon, to expand the criminal punishment regime enacted in the 1988 Act. It is crystal clear that Congress was aware of this background when it finally enacted the Aid Elimination Penalty. Far from irrelevant, this history was the "specific sequence of events leading to passage of the statute." *Aguillard*, 482 U.S. at 595.[9]

By ignoring this background, the district court refused to consider the most important evidence regarding Congress' intent in passing the Aid Elimination Penalty. The court's approach not only overlooked Defendant's concession that reviewing this legislative history would be appropriate, but

[9] Plaintiffs cited, in particular, many remarks by Representative Solomon, the sponsor of the relevant predecessor bills. As the sponsor of these bills, Representative Solomon's statements are accorded special relevance to understanding Congress' primary purpose in finally enacting a bill with nearly identical language to prior, unenacted bills. *See, e.g.*, *Brings Plenty*, 188 F.3d at 1054 (citing, in particular, explanatory remarks by a sponsor of an earlier bill that contained nearly identical provisions to those found in the final legislation).

also ignored controlling Supreme Court precedent acknowledging the relevance of that evidence.

II. THIS COURT SHOULD REMAND TO THE DISTRICT COURT TO CONSIDER IN THE FIRST INSTANCE ALL OF THE RELEVANT FACTS.

The foregoing discussion demonstrates that the district court did not properly consider whether plaintiffs have stated a claim upon which relief can be granted. Therefore, the opinion below should be reversed and the case remanded to the district court to consider all of the relevant evidence in deciding whether Plaintiffs have alleged a claim that is potentially meritorious.

A complaint should be dismissed for failing to state a claim upon which relief can be granted only if, after taking all facts alleged as true and drawing all reasonable inferences in favor of the non-moving party, the court finds *no possible set of facts* that would entitle a plaintiff to relief. *See* Fed. R. Civ. P. 12(b)(6); *Haberthur v. City of Raymore*, 119 F.3d 720, 723 (8th Cir. 1997). Although Plaintiffs have not thoroughly discussed all of their evidence in this brief, they have demonstrated that there is substantial evidence that would support their claim that Congress intended the Aid Elimination Penalty as unconstitutional punishment.

Rather than weigh—let alone ignore—Plaintiffs' evidence, the district court should have denied Defendant's motion to dismiss. *See, e.g., Breedlove v. Earthgrains Baking Co., Inc.*, 140 F.3d 797, 798-99 (8th Cir. 1998) (instructing district courts to consider, when assessing a motion to dismiss, whether plaintiffs can prove any set of facts that would entitle them to relief); *Talkington v. Am. Colloid Co.*, 767 F. Supp. 1495, 1496 (D.S.D. 1991) (noting that when considering a motion to dismiss for failure to state a claim, a district court should "not weigh the evidence which Plaintiff offers or intends to offer. Such a blunt tool should not be used simply because the Court doubts the factual merit of Plaintiff's case."). At the far end of weighing evidence, the court below explicitly did not consider all of Plaintiffs' evidence.

Quite simply, the district court not only misapprehended the import of predecessor statutes and the full legislative history of a challenged statute when discerning Congressional intent, but it then applied a clearly erroneous legal standard to Defendant's motion to dismiss. Rather than decide whether there was any possible set of facts under which Plaintiffs would be entitled to relief, the lower court ignored the evidence relating to Congress' intent to impose criminal punishment. Accordingly, this Court should remand the case for the lower court to apply the right standard against the relevant facts

in the first instance. *See*, *e.g.*, *Barham v. Reliance Stand. Life Ins. Co*., 441 F.3d 581, 584-85 (8th Cir. 2006) (reversing a grant of a motion to dismiss and remanding to the district court to assess the facts under the proper legal standard); *United States v. Bell*, 54 F.3d 502, 503-04 (8th Cir. 1995) (same); *Bartunek v. Bubak*, 941 F.2d 726, 729-30 (8th Cir. 1991) (same).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded for further proceedings.

Dated this 13th day of April 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), Plaintiffs, by their undersigned counsel, hereby certify that this brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because it contains 9,037 words.

Pursuant to Eighth Circuit Rule 28A(c), Plaintiffs state that the brief was prepared with Microsoft Office Word 2003.