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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ANN MARIE BORGES and CHRIS GURR, individually and doing business as GOOSE HEAD VALLEY FARMS,

Plaintiffs,

v.

COUNTY OF MENDOCINO, SUE ANZILOTTI and Does 1 – 25 inclusive,

Defendants.

Case No. 3:20-cv-04537-SI

PLAINTIFFS' OPPOSITION TO DEFENDANT COUNTY OF MENDOCINO'S MOTION TO DISMISS

Date: September 25, 2020
Time: 9:00 a.m.
Ctrm: 1, 17th Floor, 450 Golden Gate Avenue, San Francisco, CA
Judge: The Honorable Susan Illston

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INTRODUCTION

The County's motion to dismiss the class of one equal protection claim fails because the County grossly mischaracterized an Ordinance that provides for two categories of applicants referred to as (B)(1) and (B)(3) applicants. Section 17.080 of the Ordinance defines (B)(1) applicants as persons who were cultivating cannabis on the cultivation site prior to January 1, 2016, and (B)(3) applicants as persons who are able to provide proof of prior cultivation on a previously cultivated site (the "origin site") and seek licensing to cultivate on a different legal parcel (the "destination site").

The complaint clearly alleges that Plaintiffs (1) provided proof of prior cultivation (Complaint, ¶¶ 20-22) and (2) are "the only AG40 applicants for a permit to cultivate medical cannabis in the County of Mendocino who complied with all (B)(3) requirements but were denied a permit by the County of Mendocino." (Complaint, ¶¶ 27 and 28). The County also attempts to present evidence disputing Plaintiffs' class of one equal protection claim. Should the court treat this as a Rule 56 motion for summary judgment the Plaintiffs request the court to continue the hearing on the motion to allow Plaintiffs limited discovery pursuant to Rule 56(d).

Plaintiff Ann Marie Borges provided proof of prior cultivation in Willits (Complaint, ¶ 20), and the requested Agreement Not to Resume Cannabis Cultivation at the prior site. (Complaint, ¶ 22, and Ex. D attached). Plaintiffs were told that the permit would issue upon the County's receipt of the Agreement, attached as Exhibit D to the complaint, thus satisfying the remaining condition to obtain a permit.

Notably, on January 23, 2018, the plaintiffs obtained a permit to cultivate cannabis from the State of California, Department of Food and Agriculture. (Complaint, ¶ 24, Exhibit F

attached). In that regard, the County Ordinance provides at 17.010 that; "Adoption of this Chapter will protect the public health, safety and welfare of the residents of the County of Mendocino by adopting regulations regarding the cultivation of cannabis by individuals **consistent with the provisions of State law and local permitting structure that will operate in conformance with State licensing requirements for the commercial cultivation of cannabis, as state licenses become available**." (emphasis added)

The Plaintiffs are also pursuing a substantive due process claim based on a property interest and a liberty interest. Plaintiffs have alleged sufficient facts to support the allegation that the County of Mendocino "arbitrarily and capriciously and for no legitimate reason denied the Plaintiffs' permit" and the decision to deny the permit "shocks the conscience and/or was done with a purpose to harm or in deliberate indifference to the Plaintiffs' rights." (Complaint, ¶¶, 50 and 51) In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) the Supreme Court acknowledged that "[p]roperty interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . ." State law, i.e. California and Mendocino County statutes and regulations, has created a protectible property interest owned by those who, like plaintiffs, comply with the applicable state law permitting only intrastate commerce. Consequently, as explained in detail below, the federal law cited by defendant County does not apply and cannot deprive the plaintiffs of their property and liberty interests.

FACTS ALLEGED

The Complaint contains four overlapping claims that include, as against the County of Mendocino only, a class of one equal protection and a substantive due process claim; and two related conspiracy claims against the County and Sue Anzilotti. The County does not address the

conspiracy claims in its motion to dismiss. The Plaintiffs will address the conspiracy claims in their opposition to Sue Anzilotti's motion to dismiss. The allegations supporting the claims against the County, and that do not involve the conspiracy claims, are set forth below and taken verbatim from the complaint.

Plaintiffs thoroughly reviewed the Mendocino County guidelines for the existing Cannabis Program and reached out to the Department of Agriculture. Plaintiffs also attended numerous meetings featuring County and State agency representatives. This information helped guide the plaintiffs to the eleven (11) acres farm they purchased in August 2016 located on a private road off Boonville Road. It was ideal because it was zoned AG40 with an excellent well listed on County records. It also was level land without erosion issues and had proper sun without having to remove trees. (Dkt. 1, Complaint, ¶ 10)

On May 1, 2017 plaintiffs completed their application to cultivate medical cannabis. See Exhibit A attached. On May 4, 2017 – while accompanied by an attorney – plaintiffs met with Commissioner Diane Curry and Christina Pallman of her staff. They learned their application was approved based on the information contained in the application, documents provided, and proof of prior cultivation experience. Id., at ¶ 12; see also Ex. A at pp. 14-51 of 87.

Plaintiffs were given an "Application Receipt" signed by Commissioner Curry dated May 4, 2017. See Exhibit B attached. It provides, in part, that; "The garden at this site is considered to be in compliance, or working toward compliance, until such time as a permit is issued or denied." On June 19, 2017, the plaintiffs met with Commissioner Curry to complete an "extinguish and transfer" worksheet related to prior cultivation by Ann Marie Borges at a coastal location in the County. Id., at ¶ 13; see Ex. B attached at p. 53 of 87.

Because of a recent change to the Ordinance that impacted cultivation of cannabis at

coastal zones of the County, on or about August 14, 2017 Plaintiff Ann Marie Borges met with Commissioner Curry and provided proof of prior cultivation from the town of Willits in the County, an area not included in the coastal zone. Id., at para 20. (Note, the plaintiffs can amend the complaint to allege that this was not due to a recent change in the Ordinance. This is a collateral issue.)

On or about September 16, 2017 Plaintiffs were contacted by Commissioner Curry and notified their amended application had been approved. On September 19, 2017 the Plaintiffs went to Commissioner Curry's office to pick up the permit. The anticipated handoff was prevented by Deputy County Counsel Matthew Kiedrowski. He informed the Plaintiffs that they needed to provide additional proof that the site of prior cultivation in Willits was no longer able to resume cannabis cultivation. Id., at ¶ 21.

Plaintiffs hired a local land use attorney, Tina Wallis, to resolve this remaining issue. On or about October 31, 2017 Tina Wallis, on behalf of the Plaintiffs, submitted to Matthew Kiedrowski a signed Agreement Not to Resume Cannabis Cultivation at the prior cultivation site in Willits. See Exhibit D attached. It was anticipated the permit would then be delivered. Id., at ¶ 22; see Ex. D attached at pp. 76-77 of 87.

After completing and submitting CalCannabis applications, on January 23, 2018 the Plaintiffs received a Temporary Cannabis Cultivation License from the California Department of Food and Agriculture. See Exhibit F attached. This was issued following a close examination and inspection of the Plaintiffs' property and water supply by the CDFW, the State Water Resources Control Board, and the State Department of Food and Agriculture. Id., at ¶ 24, pp. 6-7; see Ex. F attached at p. 84 of 87.

On or about March 2018 Diane Curry left her position as Interim Commissioner of the Department of Agriculture. Id., at ¶ 25.

On July 9, 2018 the County of Mendocino, Department of Agriculture mailed a letter to the Plaintiffs notifying them that their application to cultivate medical cannabis had been denied because they did not provide evidence of prior and current cultivation on the same parcel as required by paragraph (B)(1) of the local Ordinance/10A.17.080. See Exhibit G attached. This denial was based on a false and fraudulent premise. Id. at ¶ 26; see also Ex. G attached at pp.86-87 of 87.

The express reason for denying the permit, as set forth in the letter (Ex. G) advising the Plaintiffs their application had been denied, is now at the center of the County's motion to dismiss. This is a transparent attempt to mischaracterize and obfuscate the clear language in the Ordinance distinguishing between (B)(1) and (B)(3) applicants.

The Plaintiffs never applied for a medical cannabis cultivation permit pursuant to paragraph (B)(1) of the County Ordinance. Rather, Plaintiffs' application was submitted pursuant to paragraph (B)(3) of the Ordinance which expressly allowed for permits to be issued based on "relocation." It provides that: "Persons able to show proof of prior cultivation pursuant to paragraph (B)(1) above may apply for a Permit not on the site previously cultivated (the 'origin site') but on a different legal parcel (the 'destination site') subject to the following requirements…". The Plaintiffs met all of the (B)(3) requirements as was determined by Commissioner Curry in September 2017. Id., at ¶ 27.

The Plaintiffs are the only AG40 applicants for a permit to cultivate medical cannabis in the County of Mendocino who complied with all (B)(3) requirements but were denied a permit by the County of Mendocino. Id., at ¶ 28.

The County's motion attempts to justify the denial of Plaintiffs' permit on the basis it did not comply with the requirements of (B)(1) despite the fact that their application was based on (B)(3) to relocate to recently purchased property in the County zoned AG40.

At all times relevant to this complaint (May 2017 to July 2018) the Ordinance had the language plaintiffs rely upon in relation to the distinction between (B)(1) versus (B)(3) applicants. See the County of Mendocino's Request for Judicial Notice, Dkt. 11-1. Attached as Ex. G, at pp. 121-125; Ex. H, at pp. 156-160; and Ex. I, at pp. 186-190 are the sections in the Ordinance that distinguish (B)(1) from (B)(3) applicants.

FACTS IN DISPUTE

The County moves to dismiss by raising factual issues that are in dispute. For example, the County contends that "Plaintiffs do not allege they owned, controlled or were cultivating on this second inland site (Willits) at the time of the application" notwithstanding the Ordinance did not so require. Rather, the Ordinance clearly provides that proof of cultivation at a different site prior to January 1, 2016 is all that is required.

LEGAL ARGUMENT

A. The Applicable Law

A dismissal motion should be denied if the subject complaint contains factual allegations adequate to give defendants fair notice of the pending claims, and, enables them to defend themselves if the complaint's allegations, taken as true, plausibly suggest entitlement to relief. *Starr v. Baca*, 652 F.3d 1202, 1216-1217 (9th Cir. 2011), rehearing en banc denied, 659 F.3d 850 (9th Cir. 2011). When ruling on a motion to dismiss, the court must accept as true all of the factual allegations contained in the complaint. *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007). The court must draw inferences in favor of the plaintiff. The

complaint should be construed favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Walleri v. Federal Home Loan Bank of Seattle*, 83 F.3d 1575, 1580 (9th Cir. 1996).

Dismissal for failure to state a claim is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984). The issue is whether the plaintiff is entitled to offer evidence to support the claims, not whether based on a complaint's allegations he will prevail as a matter of law. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974) (no quotations added). The Ninth Circuit has "repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000).

B. Plaintiffs Alleged Facts Establishing they are a Class of One

The plaintiffs have met the requirements of an equal protection claim brought by a class of one. *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). Plaintiffs have alleged they were intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. The plaintiffs allege that they satisfied all of the requirements to obtain a permit as (B)(3) applicants as determined by Commissioner Curry in September 2017. (Complaint, ¶¶ 21, 22 and 27.)

The Plaintiffs have further alleged that they were denied a permit based on a false premise, i.e., that they did not provide evidence of prior and current cultivation on the same parcel as required by paragraph (B)(1) of the ordinance. (Complaint, ¶ 26) In addition, the Plaintiffs have alleged that they are the only AG40 applicants who complied with all (B)(3) requirements but were denied a permit by the County of Mendocino. (Complaint, ¶ 28)

The County asks this court to look outside the four corners of the complaint and take Judicial Notice of the relevant Ordinance, 10A.17.080. The County then makes an argument based on a gross mischaracterization of the ordinance.

Chapter 10A.17 – Mendocino Cannabis Cultivation Ordinance ("MCCO")

10A.17.080 Permit Phases and Requirements Specific to Each Phase

(A) Permits under the MCCO will be issued in the following three (3) phases:

(1) Phase One: Following the effective date of the MCCO, Permits will only be issued to applicants who provide to the Agricultural Commissioner pursuant to paragraph (B)(1) of this section proof of cultivation at a cultivation site prior to January 1, 2016 ("proof of prior cultivation"), and who comply with all other applicable conditions of this Chapter and Chapter 20.242. Applications for permits during Phase One shall only be accepted until December 31, 2018 . . . Applicants able to provide proof of prior cultivation may apply for a Permit on a relocation site pursuant to paragraph (B)(3) of this section.

* * *

(B) Requirements specific to Phase One Permits

(B)(1) Proof of Prior Cultivation. Persons applying for a Permit during Phase One shall be required to provide to the Agricultural Commissioner evidence that they were cultivating cannabis on the cultivation site prior to January 1, 2016, which cultivation site shall have been, or could have been, in compliance with the setback requirements of paragraph (A) of section 10A.17.040.

* * *

(B)(3) Relocation. Persons able to show proof of prior cultivation pursuant to paragraph(B)(1) above may apply for a Permit not on the site previously cultivated (the "origin site") but on a different legal parcel (the "destination site"), subject to the following requirements:

(a) Persons may apply to relocate their cultivation site pursuant to this paragraph (B)(3) until 3 years after the effective date of the ordinance adopting this Chapter, or until May 4, 2020.
(b) The location and operation of the proposed cultivation site on the destination parcel complies with all the requirements and development standards that apply to a new cultivation site as of January 1, 2020 …
(c) The origin site shall be restored ….
(d) Unless the destination site is within the Agricultural zoning district the application shall include either a water availability analysis … or a letter.

At page 12, lines 19 through page 13, line 6 (hereinafter noted as "12:19-13:6") of the memorandum supporting its motion to dismiss, the County contends that ". . . Plaintiffs have alleged that they are the only AG40 applicants who were denied a permit despite meeting the requirements under Mendocino County Code section 10A.17.010(B)(3) (sic) [but] they do not address whether all other applicants complied with . . . section 10A.17.010(B)(1)(sic) -- the basis on which their permit was denied. . ."

As will be shown in detail, the County's memorandum refers to sections of the Mendocino County Cultivation Ordinance ("MCCO") which do not exist and never existed. Instead, the County's motion apparently refers to MCCO sections 10A.17.080(B)(1) and 10A.17.080(B)(3). However, the County's false and misleading characterization of these two sections leaves room for doubt whether the errors are merely typographical.

According to the County's motion (at 14:3-10):

> "Section 10A.17.080(B) . . . provides that 'Persons applying for a Permit during Phase One shall be required to provide to the Agricultural Commissioner evidence that they were cultivating cannabis on the cultivation site prior to January 1, 2016 . . .' Section 10A.17.080(B)(1). Although referred to as 'prior cultivation,' the applicant must demonstrate both that they historically cultivated at that location and that they are currently (emphasis in original) cultivating at that location.

In support of this absurd misstatement of the pertinent provisions, the County memo (at 14:18-19) claims that the ordinance ". . . alternatively refers to the prior site as the 'origin site' and an 'existing cultivation site' . . ." -- ignoring the clear and logically essential provision, i.e. 10A.17.080(B)(3) beginning with the word "Relocation" and continuing: "Persons able to show proof of prior cultivation pursuant to paragraph (B)(1) above may apply for a Permit not on the site previously cultivated (the 'Origin site') but on a different legal parcel (the 'destination site'),

subject to the following requirements: (a) Persons may apply to relocate their cultivation site pursuant to this paragraph (B)(3) until three (3) years after the effective date of the ordinance adopting this Chapter, or until May 4, 2020." (emphasis supplied)

To obfuscate its attempts to obscure the clear and unambiguous meaning of the ordinance and correct use of the terms "relocation," "origin site," and "destination site" in 10A.17.080(B)(3), the County's memo avers:

> In order to explain this requirement to the public, the County of Mendocino has maintained a "Frequently Asked Questions" ("FAQ") page which explains these requirements. . .
>
> Q. Is there a pathway for cultivation to obtain a Permit for a parcel/cultivation site other than the one on which the cultivator can show proof of prior cultivation" pursuant to MCC §10A.17.080(B)(1)?
>
> A. Yes, through the relocation process identified in MCC §10A.17.080(B)(3).
>
> Q. Must the cultivation activities used to show proof of cultivation prior to 1/1/16 be located on the same legal parcel as the proof of current cultivation activities?
>
> A. Yes. In order to show proof of prior cultivation pursuant to MCC §10A.17.080(B)(1)(a) & (b) a cultivation must show that the current cultivation activities prior to 1/1/16 took place on the same legal parcel. (emphasis supplied).

The oxymoronic insistence of re-defining "Relocation" from "origin site" to "destination site" as "meaning" that the "origin site" is the same legal parcel as the "destination site" is to be accepted because, according to the County's memo (at 15:11-13), "This interpretation of the County's own ordinance is entitled to substantial judicial deference, in the event that the Court finds any ambiguity in the language of the underlying ordinance."

As the Supreme Court recently held in *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1630 (2018) citing Chevron *U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), ". . . deference is not due unless a 'court, employing traditional tools of statutory construction, is

left with an unresolved ambiguity. 467 U.S. at 843." No such ambiguity exists nor can it be created by mere semantic pollution. In language applicable to the County memo's attempts to garble simple English words, the Court noted in *TVA v. Hill*, 437 U.S. 153, 174, n.18:

> Aside from this bare assertion, however, no explanation is given to support the proffered interpretation. This recalls Lewis Carroll's classic advice on the construction of language:
>
> > "'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what *I* choose it to mean -- neither more nor less.'" Through the Looking Glass, in the Complete Works of Lewis Carroll 196 (1939).

C. Plaintiffs have alleged a Property Interest

The case most directly on point is *Gerhart v. Lake County, Montana*, 637 F.3d 1013 (9th Cir. 2011). In *Gerhart*, a property owner and resident built an approach to a county road that borders his property. He was informed by a County employee that he required a permit for road approaches. His application for a permit was denied by County Commissioners. Gerhart alleged that other property owners on his block previously built unpermitted approaches, all without consequence. The denial of his permit application was rare, if not unprecedented.

The court affirmed summary judgment as to Gerhart's property claim because the County did not have a policy and practice that created a property interest, unlike the County Ordinance(s) in this case. Rather, granting permits was entirely discretionary. Id., at 1019-21. However, the court reversed and remanded the class of one equal protection claim because "the evidence suggests that the Commissioners were aware of complaints against Gerhart and might have intentionally singled him out." Id., at 1022-23. These facts parallel the conspiracy claim in this case involving a private actor, Sue Anzilotti, and her communications with co-conspirator John McCowen, a member of the Board of Supervisors. Complaint, Dkt. 1, at ¶¶ 29-33.

Here, the County relies primarily on pre-2017 unpublished decisions in support of the argument that federal law does not recognize a property interest in a local permit to cultivate cannabis. The one exception is a 2019 unpublished decision. *Citizens Against Corruption v. County of Kern*, 2019WL1979921 (E.D. Cal. 2019). That decision relied on *Brady v. Gebbie*, 859 F.2d 1543, 1548 (9th Cir 1988) for the proposition that even though state law creates a property interest, "not all state created rights rise to the level of a constitutionally protected interest." Notably, the court in *Citizens Against Corruption*, *supra*, held that plaintiff's equal protection claims were dismissed without prejudice and with leave to amend.

Since 2017, both state and federal courts in California have been struggling to make sense of the new paradigm created by the legalization of cannabis in the state coupled with both local and statewide regulations and related fees, fines and taxes. Perhaps most significant is the fact that both the state and the federal government are now collecting taxes from California residents in the business of cultivating, manufacturing, distributing and selling cannabis products.

The evolution of the law is illustrated by some recent decisions. *Granny Purps, Inc. v. County of Santa Cruz*, --- Cal.Rptr.--, 2020WL4504904 (8/5/20) (county cultivation ordinance did not render marijuana plants contraband subject to seizure); *Kent v. County of Yolo*, 41 F. Supp. 3d 1118 (E.D. Cal. 2019) (federal law does not recognize a protectable property interest in the cultivation of cannabis, yet plaintiff was given leave to amend his due process and equal protection claims).

In *Hafler v. County of San Luis Obispo*, 2018WL6074531 (C.D. Cal. 2018) the County claimed Hafler did not have an existing grow based on an alleged false claim by a neighbor thus

prohibiting him from obtaining a permit.[1] The *Hafler* court cited *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988) for the proposition that when a state actor denies a party permission to use his property in a certain fashion, the entity may violate a party's right to substantive and procedural due process. The protected property interest results from a legitimate claim of entitlement created and defined by an independent source, such as state or federal law. Id., at 1305. Hafler was given leave to amend to allege that a state or local law entitled him to grow cannabis on his property.

D. Plaintiffs have alleged a Liberty Interest.

In *Meyer v. Nebraska*, 262 U.S. 390 (1923) a teacher was convicted of violating a state law which prohibited a person from teaching any subject at a public, private or parochial school in any language other than English. In *Meyer*, *supra*, the petitioner was convicted of intentionally teaching the German language at a parochial school. The court reversed the conviction on the basis that the statute violated the plaintiff's liberty interest protected by the Fourteenth Amendment. The court noted:

> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the **right of the individual to contract, to engage in any of the common occupations of life**, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. (citations omitted). The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to protect. Determination by the Legislature of what constitutes proper

[1] This is another example where a private party attempted to influence a government decision maker to violate the constitutional rights of a neighbor.

exercise of police power is not final or conclusive but is subject to supervision by the courts." Id., at 399-400. (emphasis added)

In addition, the Supreme Court has long recognized that state statutes may create liberty interests that are entitled to the protections of the Due Process Clause of the Fourteenth Amendment. *Vitek v. Jones*, 445 U.S. 480 (1980); *Bell v. Wolfish*, 441 U.S. 520 (1979). See also, *Carlo v. City of Chino*, 105 F.3d 493 (9th Cir. 1997) (state statute requiring arrestees be given right to make immediate telephone calls created a liberty interest protected by the Due Process Clause).

The right to follow a chosen profession free from unreasonable governmental interference comes with the liberty and property concepts of substantive due process. *Green v. McElroy*, 360 U.S. 474, 492 (1959). The Due Process Clause prohibits government officials from arbitrarily depriving a person of constitutionally protected liberty or property interests, but only egregious official conduct can be said to be arbitrary in the constitutional sense. Rather, it must amount to an abuse of power lacking any reasonable justification in the service of a legitimate governmental objective. *Shanks v. Dressel*, 540 F.3d 1082, 1088 (9th Cir. 2012). See also, *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56 (9th Cir. 1994); *Hardesty v. Sacramento Metropolitan Air Quality Mgt. Dist*., 307 F. Supp. 3d 1010 (E.D. Cal. 2018).

The Plaintiffs have a liberty interest under the Due Process Clause of the Constitution to engage in common occupations such as farming. *Meyer*, *supra*. Under state law, and a County Ordinance, that liberty interest includes the right to cultivate and farm cannabis subject to certain conditions and regulations. *Carlo*, *supra*. This liberty interest is closely related to Plaintiffs' property interest claim however it is distinguishable. The liberty interest claim is also subject to the defense that the occupation of growing and selling medical cannabis is likewise illegal under

federal law. For the reasons stated below, these activities are no longer prohibited by federal law because of recent changes in California law coupled with the increasing number of states that have legalized marijuana cultivation and sales.

E. Relief is Available Regarding the Due Process Claim Because the Activities Are Not Prohibited by Federal Law.

The jurisdictional basis upon which the federal government was constitutionally permitted to prohibit the local cultivation and use of marijuana in compliance with California law is the Commerce Clause. *Gonzales v. Raich*, 545 U.S. 1 (2005). In *Gonzales v. Raich* users and growers of marijuana for medical purposes under the California Compassionate Use Act sought a declaration that the Controlled Substances Act (CSA) was unconstitutional as applied to them. The Ninth Circuit held that this separate class of purely local activities was beyond the reach of federal power. *Raich v. Gonzales*, 353 F.3d 1222 (9th Cir. 2003). The Supreme Court reversed; holding that the Commerce Clause gave Congress the authority to regulate intrastate activity because at the relevant time there was a rational basis for concerns that legally grown marijuana in California would be diverted outside that state into interstate channels.

Mendocino County's claim that plaintiffs have no property rights in their cannabis license and cannabis they have produced since legalization by the State of California (along with more than 30 other sovereign states in the United States) and Mendocino County proves too much. If the federal cannabis prohibition law—21 USC 841—applies to California's intrastate licensed and taxed agricultural, manufacturing, distribution and sales of cannabis, all of the California state and local officials who participate in these activities are *in pari delicto* or *particeps criminis* committing federal felonies—violating 18 USC 371 as co-conspirators and 18 USC 2 as aiders and abettors. Furthermore, these same state and county officials are guilty of 18 USC

1956(a)(1)(A)(i) money laundering and racketeering in violation of 18 USC 1962(c) and (d).

But the conundrum created by Mendocino County's claim of such massive criminal activities and the absurd results dictated by thus construing 21 USC 841 are easily resolved by a close reading of *Gonzales v. Raich*, 545 US 1 (2005), which limited the orbit of 21 USC 841 to activities which affect interstate commerce. By its recent enactment of the licensing and taxing statutes which strictly confine all distributions and sales to the State of California, there is no longer any basis for contending that such lawful activities affect interstate commerce. In fact and in law any persons who knowingly participate in cannabis production, manufacturing, distribution and/or sales destined for transportation beyond California's borders are violating 21 USC 841 and, if they do so in cooperation with others having knowledge of such illegal transportation, also violate 18 USC 2 and 371; and, if they engage in financial transactions with the sales proceeds also violate 18 USC 1956—plus 18 USC 1962 if they utilize an enterprise repeatedly to commit such illicit transportation.

In rejecting petitioners' challenges to the preferential treatment afforded to Virginia's citizens compared to out-of-state citizens seeking equal benefits from Virginia's Freedom of Information Act ("FOIA"), the Supreme Court in *McBurney v. Young*, 569 U.S. 221 (2013) held (at page 235):

> Virginia's FOIA law neither 'regulates' nor 'burdens' interstate commerce; rather, it merely provides a service to local citizens that would otherwise not be available at all. The 'common thread' among those cases in which the Court has found a dormant Commerce Clause violation is that 'the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation.' (citation omitted).

Gonzales v. Raich, 545 U.S. 1, 18 (2005) found private consumption of cannabis analogous to red winter wheat in *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1940) because ". . .

Congress can regulate purely intrastate activity that is not itself 'commercial,' i.e. not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."

The "interstate market" to which the Court referred was by definition and in fact a strictly illegal market. The Court explained its rationale for lumping intrastate and interstate cannabis commerce together was predicated on assuming ". . . the enforcement difficulties that attend distinguishing between [cannabis] cultivated locally and [cannabis] grown elsewhere . . . and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the interstate manufacture and possession of marijuana would leave a gaping hole in [21 U.S.C. 841]." *Gonzalez*, 545 U.S. at 22.

Fifteen years after the events adjudicated in *Gonzales v. Raich*, California promulgated comprehensive state and local statutes that include licensing and taxation of cannabis production, manufacturing, distribution and sales strictly confined to the State of California. Consequently, the contentions concerning "diversion into illicit channels" have been eliminated by the creation of adequate enforcement resources funded by the billions of dollars in intrastate cannabis commerce itself and the continuing enforceability of 21 U.S.C. 841 against any persons knowingly trafficking in such "illicit diversion(s)." See, Plaintiffs' Request for Judicial Notice, Exhibits A and B respectively: (A) the State of California's "Tax Guide for Cannabis Business" and (B) the "California Department of Tax and Fee Administration Reports Cannabis's Tax Revenues for the Second Quarter of 2019."

In holding that California's environmental protection law's higher standards than federal law did not infringe on Congress's power to regulate interstate commerce, the Ninth Circuit explained in *Rocky Mtn. Farmers Union v. Corey*, 730 F.3d 1070 (2013) at 1087:

The Commerce Clause provides that "congress shall have power . . . to regulate commerce . . . among the several States." U.S. Const., art. 1 §8, cl. 3. This affirmative grant of power does not explicitly control the several states, but it "has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce. (citations omitted). Known as the "negative" or "dormant" Commerce Clause, this aspect is not a perfect negative, as the Framers' distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy. Within the federal system a courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. If successful, those experiments may often be adopted by other states without Balkanizing the national market or by the federal government without infringing on state power.

California's "courageous experiments" with cannabis and clean air are beyond the orbit of Congressional Commerce Clause power.

CONCLUSION

For the forgoing reasons the County of Mendocino's motion to dismiss should be DENIED.

Dated: August 27, 2020

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