CHRISTIAN M. CURTIS, County Counsel SBN 270918
Office of the County Counsel
County of Mendocino
501 Low Gap Road, Room 1030
Ukiah, CA 95482

Telephone: (707) 234-6885
Facsimile: (707) 463-4592
cocosupport@mendocinocounty.org

Attorney for Defendant
County of Mendocino

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.	3:20-cv-04537-SI **COUNTY OF MENDOCINO'S REPLY TO PLAINTIFFS' OPPOSITION TO COUNTY DEFENDANT'S MOTION TO DISMISS** DATE: September 25, 2020 TIME: 10:00 a.m. CTRM: 1, 17th Floor 450 Golden Gate Ave, San Francisco Honorable Susan Illston, Senior District Judge

I. INTRODUCTION

Plaintiffs Ann Marie Borges and Chris Gurr ("Plaintiffs") have brought this action seeking lost profits and other damages from the County of Mendocino's ("County") denial of their application for a permit to cultivate cannabis commercially. Plaintiffs' claims are based exclusively on 42 United States Code section 1983, as any relevant state law claims would be time barred. The County moved to dismiss Plaintiffs' Complaint under Federal Rules of Civil Procedure section 12(b)(6) for failure to state a claim on which relief can be granted. The

County noted that, among other defects, Plaintiffs' Complaint alleged facts that show permit denial was appropriate under the relevant ordinance, that Plaintiffs cannot have a constitutionally protected interest in a local entitlement to cultivate contraband *per se*, and that the denial of an opportunity to commercially cultivate cannabis is not a cognizable injury under the relevant federal statutes, because cannabis cultivation is prohibited under federal law.

In Plaintiffs' Opposition to Defendant County of Mendocino's Motion to Dismiss ("Opposition"), Plaintiffs argue that the County's interpretation of the County ordinance is inconsistent with the ordinance's language and that commercial cannabis cultivation is now legal under federal law, because recent changes to California law have rendered applicable portions of the Controlled Substance Act unconstitutional and void. Plaintiffs also appear to contend that the Court may not consider the full text of the local ordinances quoted in Plaintiffs' Complaint, suggesting that they may only be considered in a motion for summary judgment. Opposition [1:16-17]. These arguments lack merit.

II. LEGAL ARGUMENT

Plaintiffs' Opposition fails to provide any persuasive argument as to why the County's Motion to Dismiss should be denied. As the Complaint makes clear, and the Opposition clarifies, Plaintiffs' claims are predicated on the belief that any historical cannabis cultivation in Mendocino County exempts Plaintiffs from the moratorium on new cultivation activities under the County's ordinance. This assertion, however, is inconsistent with the language of the ordinance, and Plaintiffs have not alleged facts which establish that a disagreement over the interpretation of a local ordinance rises to the level of a federal constitutional violation. Moreover, as set forth more fully herein, Plaintiffs' contention that federal law no longer prohibits the cultivation of cannabis is inaccurate.

A. Conversion to Summary Judgment Would be Improper.

As preliminary matter, the County notes that conversion of the County's motion to dismiss into a motion for summary judgment would be improper. Plaintiffs have taken issue with the County's request for judicial notice of its ordinance and FAQs, suggesting that these documents create evidentiary issues that should be addressed by a motion for summary

judgment. Opposition [1:10-17]. As noted in County's Request for Judicial Notice, however, these documents are of the sort which the Court may properly consider at this stage. This is especially so because these documents are referenced and incorporated in the Plaintiffs' Complaint. See Complaint ¶¶ 15, 20, 26, 27-28 (citing the ordinance); Complaint Ex. G (citing the FAQs). In considering a 12(b)(6) motion to dismiss "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference. . . ." *Tellabs, Inc. v. Makor Issues & Rights*, Ltd., 551 U.S. 308, 322 (2007); see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 568 n.13, 127 S. Ct. 1955, 1972 (2007) ("[T]he District Court was entitled to take notice of the full contents of the published articles referenced in the complaint, from which the truncated quotations were drawn.") As such, these materials are appropriate for consideration in connection with the Motion to Dismiss.

B. Plaintiffs' Argument Ignores the Relevant Language and Purpose of the County's Ordinance.

In the County's Motion to Dismiss, the County noted that the facts alleged in Plaintiffs' Complaint affirmatively show that they were not entitled to the permit for which they applied. Specifically, the County created a limited window in which existing cultivators could apply to bring their cultivation sites into compliance with local regulation. Plaintiffs' application, however, was for a new cultivation site, before such activities were allowed. Although Plaintiffs attempted to characterize their application as a relocation of their cultivation site, it is clear from the papers that the site they were attempting to relocate had been abandoned prior to Plaintiffs' application.[1] Accordingly, denial of the permit was proper, and Plaintiffs' Equal Protection claims fail as a matter of law.

[1] Plaintiffs argue that this conclusion goes beyond the facts alleged in the Complaint. Opposition [6:11-16]. It is correct that the Complaint does not explicitly state whether Plaintiffs were actively cultivating at the Willits location. The facts as alleged in the Complaint, however, strongly imply that no cultivation was occurring, because Plaintiffs did not reference the Willits location in their application until after they learned that they could not relocate from the coastal zone. Complaint ¶ 20. For the purposes of the Motion to Dismiss, however, the Court need not rely on this inference—it is sufficient to note that Plaintiffs have failed to allege current

In their Opposition, Plaintiffs make no argument that they have or can allege facts showing that they were cultivating the Willits location at the time they applied for a relocation permit. Opposition [7:14-11:8]. Instead, Plaintiffs' argument rests exclusively on their assertion that the County's Ordinance entitled them to a relocation permit, even if cultivation at the origin site was purely historic. Plaintiffs' arguments, however, continue to ignore the operative language in the County's ordinance or the underlying policy driving this requirement.

Plaintiffs' arguments focus on section 10A.17.080(B)(3) of the Mendocino County Code, which authorizes existing cultivators to relocate their cultivation sites to new parcels during Phase I.[2] Specifically, Plaintiffs note that in order to apply for a relocation permit, section 10A.18.080(B)(3) requires that they demonstrate proof of prior cultivation. *See* Opposition [7:14-11:8]. Plaintiffs contend that the plain language of this section requires only proof of historic cultivation, not current cultivation, at the origin site. Plaintiffs' argument, however, omits and ignores the relevant section of the ordinance. Specifically, under section 10A.17.080(B)(1)(b), evidence of prior cultivation must also include evidence of current cultivation activities on the site.

This requirement is important. Absent cultivation at the origin site, a permit under section 10A.17.080(B)(3) would not constitute "relocation" in any meaningful sense. The County's ordinance contemplates that there will be an "existing cultivation site . . ." at the original location. MCC 10A.17.080(B)(3)(b)(i). It further contemplates that the applicant will have the right and ability to restore that site by removing greenhouses, fences, dams, ponds, compost, and other materials used in cultivation, as well as restore native vegetation to the location. MCC 10A.17.080(B)(3)(c). Moreover, the ordinance is explicit that relocation is only available to those that can demonstrate proof of prior cultivation under MCC 10A.17.080(B)(1).

Plaintiffs' interpretation of the County's ordinance would not be consistent with the intent behind these requirements, would create absurd results, and would potentially introduce constitutional infirmities into the ordinance. Plaintiffs appear to be arguing that the requirement

---

cultivation at the Willits location and therefore failed to state facts showing that they are entitled to relief.

[2] Plaintiffs have noted that the County's Motion to Dismiss contains a typographical error referring to section 10A.17.080 as section 10A.17.010 on page 14. The County apologizes to the Court and the parties for any confusion created by this error.

to demonstrate existing cultivation activities under MCC 10A.17.080(B)(1)(b) only applies to those applicants who *do not* seek to relocate. Such a requirement, however, would make no sense. Under Plaintiffs' reading of the ordinance, an applicant who had abandoned cultivation activities in Mendocino prior to enactment of the ordinance would be eligible for a Phase I permit on any parcel except the one that they had previously cultivated. Moreover, Phase I's moratorium on new cultivation would be selectively applied only to the class of persons who had never historically cultivated cannabis in Mendocino at some point in the past. Such a rule would not be consistent with the County's intent in creating a phased permitting process, is not supported by the text of the ordinance, and has no obvious rational basis. Accordingly, Plaintiffs' interpretation of the County's ordinance should be rejected.

C. Cannabis Cultivation is Prohibited by Federal Law.

As noted in the County's Motion to Dismiss, none of Plaintiffs' claims present a cognizable injury under federal law, because the sole alleged injury is the denial of a local permit to cultivate a crop that remains contraband *per se* under federal statute. Consequently, Plaintiffs cannot claim a property interest in a local cannabis permit, and established legal doctrines bar recovery under federal tort law. In their Opposition, Plaintiffs now argue that the cultivation and sale of cannabis "are no longer prohibited by federal law . . ." Opposition [15:1]. Specifically, Plaintiffs argue that California's current regulatory scheme and enforcement mechanisms prevent "billions of dollars in intrastate cannabis commerce . . ." from being within Congress's authority under the Commerce Clause of the United States Constitution. USCS Const. Art. I, § 8, Cl 3; Opposition [17:13-23]. These arguments, however, thoroughly misunderstand the scope of Congress's Commerce Clause authority and misread Plaintiffs' own legal authority.

Under the Unites States Constitution, Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." USCS Const. Art. I, § 8, Cl 3. It is, however, well settled that "[t]he commerce power is not confined in its exercise to the regulation of commerce among the states." *Wickard v. Filburn*, 317 U.S. 111, 124, 63 S. Ct. 82, 89 (1942) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 at 119 (1942)). Instead,

> It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce . . . Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.

Ibid. Consequently, the Supreme Court has "upheld a wide variety of congressional Acts regulating intrastate economic activity where [the Court] ha[s] concluded that the activity substantially affected interstate commerce." *United States v. Lopez*, 514 U.S. 549, 559, 115 S. Ct. 1624, 1630 (1995); see also *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 268, 101 S. Ct. 2352, 2356 (1981); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 115, 62 S. Ct. 523, 524 (1942).

Plaintiffs' argument that intrastate commercial cannabis cultivation lies outside of Congress's Commerce Clause authority relies, counterintuitively, on *Gonzales v. Raich*, a case which held the opposite. Opposition [15:6-17:23]; 545 U.S. 1, 125 S. Ct. 2195 (2005). *Gonzalez v. Raich* dealt with a challenge to the Controlled Substances Act's prohibition of the possession of cannabis on Commerce Clause grounds. Plaintiffs in *Gonzalez v. Raich* "argue[d] that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause." *Gonzales v. Raich*, 545 U.S. 1, 15, 125 S. Ct. 2195, 2204-05 (2005). The Supreme Court rejected these contentions, based in part on the conclusion that Congress might have rationally believed that cultivation for personal use in California could be diverted into an illegal interstate market. *Id.*

Plaintiffs in this case argue that under the holding in *Gonzalez v. Raich*, recent changes to State law now demand a different result. Specifically, Plaintiffs argue that California's recent legalization of *commercial* cannabis activity, and the corresponding regulations restricting interstate sales, eliminate the possibility that the California cannabis industry will impact interstate commerce through illegal diversion. Consequently, Plaintiffs contend that the same statutory provisions found to be within Congress's authority under *Raich*, have been subsequently voided by new State legislation. There are two major flaws with this argument.

The first problem with Plaintiffs' argument is that it ascribes to *Gonzalez v. Raich* an analysis that the Supreme Court explicitly rejected. The dissent in *Gonzalez v. Raich* did opine

that "if California and other States are effectively regulating medical marijuana users, then these users have little effect on the interstate drug trade." *Gonzales v. Raich*, 545 U.S. 1, 68, 125 S. Ct. 2195, 2235 (2005) (O'Conner, dissenting). The majority, however, expressly rejected this analysis, holding instead that the cannabis prohibition was constitutional "even if California's current controls . . . are '[e]ffective . . .'" *Gonzales v. Raich*, 545 U.S. 1, 29 n.38, 125 S. Ct. 2195, 2213 (2005). Under the majority's analysis, "state action cannot circumscribe Congress' plenary commerce power." *Gonzalez v. Raich* at 29. Therefore, the Court "need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Gonzales v. Raich*, 545 U.S. 1, 22, 125 S. Ct. 2195, 2208 (2005); see also *United States v. Darby*, 312 U.S. 100, 114, 61 S. Ct. 451, 457 (1941). Consequently, while Plaintiffs argue that *Raich* demands a different result now because "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 . . ." this factor is not relevant because "California's decision . . . to impose 'stric[t] controls' on the 'cultivation and possession of marijuana' . . . cannot retroactively divest Congress of its authority under the Commerce Clause." Opposition [17:12-15]; *Gonzales v. Raich*, 545 U.S. 1, 29 n.38, 125 S. Ct. 2195, 2213 (2005).

The second problem with Plaintiffs' argument is that it relies on unreasonable and unsupported inferences about the effects of increased commercial cannabis cultivation on interstate commerce. In concluding that personal use could impact interstate commerce, the *Raich* court noted that "[o]ne need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana . . . locally cultivated for personal use . . . may have a substantial impact on the interstate market for this extraordinarily popular substance." *Gonzales v. Raich*, 545 U.S. 1, 28, 125 S. Ct. 2195, 2212 (2005). Plaintiffs now contend that California's new regulatory scheme has created "billions of dollars in intrastate cannabis commerce . . ." Opposition [17:12-15]. Plaintiffs argue, however, that this expanded industry has a less substantial impact on interstate commerce than the cultivation for personal use at issue in *Raich*. This counterintuitive inference, however, is unsupported by any meaningful analysis or authority. The logical inference is that a larger intrastate market is likely to have a larger, not smaller, impact on interstate commerce. Thus, even if *Gonzalez v. Raich*

did not foreclosure inquiry into the practical effect of State regulation on interstate commerce, Plaintiffs have not established that the recent changes to California law reduce the impact on the interstate cannabis market. Given these defects in Plaintiffs' argument, it is perhaps unsurprising that federal Courts have continued to rely on *Gonzales v. Raich* for the validity of the Controlled Substances Act. See *United States v. Lynch*, 903 F.3d 1061 (9th Cir. 2018); *Grandpa Bud, Ltd. Liab. Co. v. Chelan Cty. Wash.*, No. 2:19-CV-51-RMP, 2020 U.S. Dist. LEXIS 91724, at *9.

Plaintiffs' only other argument as to why cannabis is legal under federal law is that, absent such a result, State and local regulators are committing a federal crime by imposing their permitting requirements upon the cannabis industry. While Plaintiffs' assertion on this front raises interesting questions about the proper interpretation of federal statutes as well as constitutional issues of federalism and the Tenth Amendment, this case does not truly present an opportunity to adequately brief those issues. [3] Plaintiffs have provided no meaningful argument or explanation as to how Congress has or can criminalize local regulatory schemes at odds with federal requirements. Moreover, even if Plaintiffs' assertion were correct, they would not entitle Plaintiffs to the relief they seek. Accordingly, Plaintiffs' arguments fail to establish that the Motion to Dismiss should be denied.

D. Plaintiffs' Request for Judicial Notice Should be Denied.

In connection with their Opposition to the County's Motion to Dismiss, Plaintiffs have requested judicial notice of two documents pertaining to local cannabis taxation in California. Because the purpose for which judicial notice is requested isn't explicitly stated, it is unclear whether Plaintiffs are requesting judicial notice of the existence of the documents or the truth of any factual assertions contained therein. Plaintiffs' Opposition cites these documents only once, for the proposition that California's efforts to prevent interstate cannabis commerce has "adequate enforcement resources . . ." Opposition [17:17-23]. Although one of the documents

[3] These issues are especially novel given the federal government's defunding and deprioritizing of enforcement efforts. If Plaintiffs' argument were correct, then Congress could effectively conscript local legislatures and law enforcement by forcing states to choose between adopting and enforcing local laws to mirror Congress's, or tolerating a wholly unregulated industry with no federal enforcement of prohibition.

does purport to show state cannabis tax revenues, it does not specify what amount is spent on cannabis related enforcement activities, and enforcement is not listed among the programs funded in that document. See RJN, Ex. A at p. 2 ("CDTFA-administered programs account for over $70 billion annually which in turn supports local essential services such as transportation, public safety and health, libraries, schools, social services, and natural resource management programs through the distribution of tax dollars going directly to local communities.").

These documents are not relevant to the motion at bench. As noted above, *Gonzalez v. Raich* explicitly held that the effectiveness of local regulation in preventing diversion into an interstate market has no bearing on the scope of Congress's Commerce Clause authority. Additionally, Plaintiffs have provided no argument or explanation as to what funding level they believe would be "adequate" to prevent any impact on interstate commerce, nor have they pointed to how these documents establish the effectiveness of those efforts. Opposition [17:17-23]. Accordingly, judicial notice of these documents is improper.

III. CONCLUSION

For the reasons stated herein, the County respectfully requests that the Motion to Dismiss be granted and that leave to amend be denied.

Dated: September 3, 2020

OFFICE OF THE COUNTY COUNSEL
Mendocino County

by /s/ Christian M. Curtis
CHRISTIAN M. CURTIS, County Counsel
Attorney for Defendant
County of Mendocino

CHRISTIAN M. CURTIS, County Counsel SBN 270918
Office of the County Counsel
County of Mendocino
501 Low Gap Road, Room 1030
Ukiah, CA 95482

Telephone: (707) 234-6885
Facsimile: (707) 463-4592
cocosupport@mendocinocounty.org

Attorney for Defendants County of Mendocino

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.	3:20-cv-04537-SI **PROOF OF SERVICE** DATE: September 25, 2020 TIME:10:00 a.m. CTRM: 1, 17th Floor, 450 Golden Gate Avenue, San Francisco, California Honorable Susan Illston, Senior District Judge

I hereby declare that I am over the age of eighteen years and am not a party to this legal action. I am in an office that employs a member of the bar of this Court, at whose direction the within service was made. My business address is Mendocino County Counsel, 501 Low Gap Road, Room 1030, Ukiah, CA 95482.

On September 3, 2020, I served the following:

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

on the interested parties in the action by placing true copies thereof, enclosed in sealed envelopes, with first class postage thereon fully prepaid, in the United States mail at Ukiah, California, addressed as follows:

John Houston Scott
SCOTT LAW FIRM
1388 Sutter Street, Suite 715
San Francisco, California 94109

William A. Cohan
WILLIAM A. COHAN, P.C.
P.O. Box 3448
Rancho Santa Fe, CA 92067

Brian C. Carter
CARTER RICH PC
305 S. Main Street
P.O. Box 1709
Ukiah, CA 95482

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 3rd day of September, 2020, at Ukiah, California.

/s/ Uta Telfer
Uta Telfer