John Houston Scott, SBN 72578
SCOTT LAW FIRM
1388 Sutter Street, Suite 715
San Francisco, California 94109
Telephone: (415) 561-9601
Facsimile: (415) 561-9609
john@scottlawfirm.net

William A. Cohan, SBN 141804
WILLIAM A. COHAN, P.C.
P.O. Box 3448
Rancho Santa Fe, CA 92067
Telephone: (858) 832-1632
Facsimile: (858) 832-1845
bill@williamacohan.com

Attorney for the Plaintiffs

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, JOHN McCOWEN, CARRE BROWN, GEORGEANNE CROSKEY, MASON HEMPHILL and Does 1-25 inclusive,

Defendants.

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

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

(*Ann Marie Borges, et al., v. County of Mendocino, et al.*, Case No. 3:20-cv-04537-SI)

I, Sherry Alhawwash, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. My business address is 1388 Sutter Street, Suite 715, San Francisco, California 94109. On November 17, 2020, I served the attached:

NOTICE OF CONSTITUTIONAL QUESTION CONCERNING THE SCOPE OF 21 U.S.C. §§ 841(A)(1) AND 812 (c)(10) PURSUANT TO F.R.CIV.P. 5.1(a)(1)(A)

FIRST AMENDED COMPLAINT FOR DAMAGES, DECLARATORY AND INJUNCTIVE RELIEF

on the interested party(ies) named below:

William P. Barr Attorney General's Office U.S. Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001	David L. Anderson United States Attorney's Office 450 Golden Gate Avenue, 11th Floor San Francisco, CA 94102-3421

I served the attached document(s) in the manner indicated below:

☒ **BY CERTIFIED MAIL:** I caused true and correct copy(ies) of the above documents to be placed and sealed in envelope(s) with the postage thereon fully prepaid and certified addressed to the addressee(s) named above and, following ordinary business practices, placed said envelope(s) at 1388 Sutter Street, Suite 715, San Francisco, CA 94109, for collection and mailing with the United States Postal Service and there is delivery by the United States Post Office at said address(es). In the ordinary course of business, correspondence placed for collection on a particular day is deposited with the United States Postal Service that same day.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed November 17, 2020 at San Francisco, California.

/s/ Sherry Alhawwash
Sherry Alhawwash

John Houston Scott, SBN 72578
SCOTT LAW FIRM
1388 Sutter Street, Suite 715
San Francisco, California 94109
Telephone: (415) 561-9601
Facsimile: (415) 561-9609
john@scottlawfirm.net

William A. Cohan, SBN 141804
WILLIAM A. COHAN, P.C.
P.O. Box 3448
Rancho Santa Fe, CA 92067
Telephone: (858) 832-1632
Facsimile: (858) 832-1845
bill@williamacohan.com

Attorney for the Plaintiffs

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, JOHN McCOWEN, CARRE BROWN, GEORGEANNE CROSKEY, MASON HEMPHILL and Does 1 – 25 inclusive,

Defendants.

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

NOTICE OF CONSTITUTIONAL QUESTION CONCERNING THE SCOPE OF 21 U.S.C. §§ 841(a)(1) AND 812(c) (10) PURSUANT TO F.R.CIV.P. 5.1(a)(1)(A)

Plaintiffs Ann Marie Borges and Chris Gurr, individually and doing business as Goose Head Valley Farms, by and through their undersigned counsel, hereby give notice pursuant to F.R.Civ.P. 5.1(a)(1)(A) that in their First Amended Complaint (Doc. #31), filed October 23,

2020, they are challenging the applicability to their cannabis -- which was grown, manufactured and possessed in Mendocino County, California, pursuant to a license issued by that state -- of 21 U.S.C. §841(a)(1) insofar as that provision includes Cannabis aka "Marihuana" (21 U.S.C. §842(c) (10)) as ". . . a controlled substance. . . ." [1]

I. Plaintiffs' Complaint Identifies Their Intrastate Cannabis Licensed By the State of California

1. The marijuana plants and samples identified above were grown with a license and subject to state regulation. It was and is property protected by state law and was seized under color of state law. By licensing and taxing production, distribution and sales of cannabis, the State of California has created a property interest in cannabis products produced for distribution and sale in the State of California. In *Diaz v. Gates*, 420 F.3d 897, 899 (9th Cir. 2005) (en banc) the Ninth Circuit cited *Doe v. Roe*, 958 F.2d 763, 768 (7th Cir. 1992) in support of its holding that

> "While federal law governs most issues under RICO, whether a particular interest amounts to property is quintessentially a question of state law. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982)." ("The hallmark of property . . . is an individual entitlement grounded in state law. . ."); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (property interests "are created and their dimensions are defined by sources such as state law.")

2. In *Gonzales v. Raich*, 545 U.S. 111 (2005), the Court did not directly address the existence *vel non* of a property interest in production, distribution, sales or possession of cannabis aka marijuana. Instead, the Court focused on whether Article I, Section 8 of the United States Constitution -- the interstate commerce clause -- empowered the federal government to prohibit the production, possession, distribution and sale of cannabis, relying on its decision in *Wickard v. Filburn*, 317 U.S. 111, 178 (1942):

> Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce. 545 U.S. at 17

[1] 21 U.S.C. §§841(a)(1) and 812(c)(10) are part of the 1970 "Controlled Substances Act" ("CSA") and its amendments found at 21 U.S.C. §§801 through 971.

3. The Court stated its equation drawn between red winter wheat in *Wickard* and marijuana in *Gonzales v. Raich* as follows:

> In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity. (emphasis supplied) 545 U.S. at 19

4. As a matter of fact, law and logic that contention is no longer valid because there is no legal "national market" for marijuana produced, possessed, distributed and sold in California pursuant to licenses granted by the State of California. Conversely, marijuana produced, possessed, distributed or sold pursuant to license(s) granted by the State of California is subject to federal regulation if, but only if, that marijuana is transported beyond the State of California, i.e. is destined for or part of said illicit "national market." The *Gonzales v. Raich* Court explained its rationale:

> In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We 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. (citations omitted) Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, 21 U.S.C. §801(5), and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the Controlled Substances Act. 545 U.S. at 22 (emphasis supplied)

5. Obviously, marijuana produced, possessed, distributed, or sold in California without compliance with the State of California's licensing statutes is not property protected from federal prohibition. Because marijuana produced, possessed, distributed or sold in California is readily distinguishable from unlicensed marijuana based on its labelling, tracing, taxation and comprehensive enforcement by the State of California, the Court's rational basis is no longer rational.

6. The "gaping hole" on which Congress and the Court relied in the prohibition of

intrastate manufacture and possession of marijuana has been filled by the State of California's implementation of its own comprehensive regulation, including ". . . distinguishing between marijuana cultivated locally (pursuant to a license) and marijuana grown elsewhere" -- or anywhere without a license. Accordingly, the plaintiffs had the right to cultivate and distribute cannabis subject to the restrictions contained in the temporary permit issued by Commissioner Curry.

7. As recently as eight years ago, no state other than California whose voters approved the Compassionate Use Act to legalize medicinal marijuana in 1996, was tolerant of any form of cannabis. Since then 34 states and the District of Columbia have legalized the use of cannabis either for medicinal or recreational purposes.

II. Application of State Law: 21 U.S.C. §903

The pre-emption provision of the Controlled Substances Act ("CSA") is contained in 21 U.S.C. §903, stating:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

Section 903 plainly provides for states to legislate in the field, which is consistent with the presumption against pre-emption discussed in *Wyeth v. Levine*, 555 U.S. 555, 565-570 (2009):

> ". . . the purpose of Congress is the ultimate touchstone in every pre-emption case. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted) In all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" Lohr, 518 U.S. at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

The Court notes the fundamentals of federalism provide the legal foundation for the presumption against pre-emption:

> "We rely on the presumption because respect for the States as 'independent sovereigns in our federal system' leads us to assume that 'Congress does not cavalierly pre-empt state law causes of action.'" (citations omitted) *Id.* 555 U.S. at 566 n.3

In *Bond v. United States*, 572 U.S. 844 (2014) the Court explained:

> "Because our constitutional structure leaves local criminal activity to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach. *Id.* at 848
>
> * * *
>
> In our federal system, the National Government possesses only limited powers; the State and the people retain the remainder. The States have broad authority to enact legislation for the public good -- what we have often called a 'police power.' *United States v. Lopez*, 514 U.S. 549, 567 (1995). . . A criminal act committed wholly within a State 'cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States,' *United States v. Fox*, 95 U.S. 670, 672 (1878). The Government frequently defends federal criminal legislation on the ground that the legislation is authorized pursuant to Congress's power to regulate interstate commerce. *Id.* at 854.

The *Bond* Court's exegesis of the limitations on Congress's authority conferred by the interstate commerce clause cites three crucial cases beginning with *United States v. Bass*, 404 U.S. 336 (1971) including *United States v. Morrison*, 529 U.S. 598 (2000) and *United States v. Jones*, 529 U.S. 848 (2000). In *Morrison*, the Court invalidated parts of the Violence Against Women Act of 1994 because they exceeded the powers granted to Congress under the Commerce Clause and the Fourteenth Amendment's Equal Protection Clause.

In *Bass*, the Court interpreted a statute that prohibited any convicted felon from receiving, possessing, or transporting in commerce or affecting commerce . . . any firearm (internal citations omitted):

> The Government argued that the statute barred felons from possessing all firearms

> and that it was not necessary to demonstrate a connection to interstate commerce. We rejected that reading, which would 'render traditionally local criminal conduct a matter for federal enforcement. . .' *Id.* at 404 U.S. 350. We instead read the statute more narrowly to require proof of a connection to interstate commerce in every case, thereby 'preserving as an element of all the offenses a requirement suited to federal criminal jurisdiction alone.' *Id.* at 351.

* * *

In *Jones* the Court considered whether the Federal arson statutes, which prohibited burning 'any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce,' reached an owner-occupied private residence. *Jones*, 529 U.S. at 850. The *Bond* Court elaborated that in *Jones*:

> Once again we rejected the Government's 'expansive interpretation,' under which 'hardly a building in the land would fall outside the federal statute's domain.' *Jones*, 529 U.S. at 857. We instead held that the statute was 'most sensibly read' more narrowly to reach only buildings used in 'active employment for commercial purposes. (internal citations omitted) . . .' These precedents make clear that it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute. *Bond*, 572 U.S. 844 at 858-860.

III. Pre-Emption Is Not An Independent Grant of Legislative Power to Congress

In *Murphy v. NCAA*, 138 S.Ct. 1461, 1479 (2018), the Court emphatically rejected the unstated premise of Defendants' insistence that federal law invalidates Plaintiffs' property claims because cannabis is "contraband per se," i.e. that the CSA's §812(c)(10) prohibition of "marihuana" is a valid pre-emption provision:

> Respondents and the United States defend the anti-authorization prohibition on the ground that it constitutes a valid preemption provision, but it is no such thing. Preemption is based on the Supremacy Clause, and that Clause is not an independent grant of legislative power to Congress. Instead, it merely provides 'a rule of decision.' (internal citation omitted). It specified that federal law is supreme in case of a conflict with state law.

Forty years ago, the Court noted that if there is no conflict, "state law governs." *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979). The Tenth Amendment provides the

foundation for Plaintiffs' and the State of California's claims to a property interest in cannabis, including proceeds of sales and taxes thereon:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

Defendants do not address California's creation of a property interest in cannabis for Plaintiffs and the state itself, including the state's agents who have "conspired" with all licensees and the state's tax revenues derived from cannabis cultivation, manufacturing of derivatives, distribution and sales. The State of California's creation -- its comprehensive cannabis licensing and taxation bureaucracy -- is the "elephant in the room," but it is only one of a herd of elephants: thirty-four (34) of our fifty states and the District of Columbia have done likewise. If, as Defendants baldly proclaim, Plaintiffs committed federal crimes under the CSA, we are confronted by the *reductio ad absurdum* that all those thousands of state agents have violated and continue to violate 18 U.S.C. §371, 21 U.S.C. §841(a)(1), and 18 U.S.C. §1956(a)(1)(A)(i), i.e. conspired to commit violations of the CSA and launder the proceeds "with the intent to promote the carrying on of specified unlawful activity. . ."

IV. Due Process Prohibits Laws Simultaneously Licensing and Criminalizing Identical Conduct

As the Court held in *Cox v. Louisiana*, 379 U.S. 559, 574, there is a plain requirement for laws and regulations to be drawn so as to give citizens fair warning as to what is illegal. Furthermore, as the Court held in *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972):

> . . . because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning . . . if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

The case at bar requires final determination whether there is pre-emption, which is explained in *Murphy v. NCAA*, 138 S.Ct. at 1480:

> Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with federal law; and therefore the federal law takes precedence and the state law is preempted.

Defendants do not even mention any of the "three different types of pre-emption -- "conflict," "express," and "field," (internal citations omitted) . . . all of [which] work in the same way . . ." explained in *Murphy*. *Id.* at 138 S.Ct. 1480. Defendants' omission is purposeful and fatal because, as explained above, (1) §903 of the CSA nullifies any claim of express pre-emption; (2) which *ipso facto* refutes any contention that the CSA pre-empts the field; (3) leaving only conflict pre-emption available for discussion.

Defendants eschew any such discussion because *Gonzales v. Raich, supra* -- on which their claims of "contraband *per se*" are totally dependent -- offers only "interstate commerce" in the absence of any evidence that Ms. Raich's cannabis was or would be transported in interstate commerce. Reliance on "interstate commerce" was justified by "the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere," which "would leave a gaping hole in the Controlled Substance Act" if there were a "failure to regulate the intrastate manufacture and possession of marijuana."

Defendants are well aware that no such "enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere" exist any longer since California's, thirty-three other states' and the District of Columbia's enactments of comprehensive legislation and regulations, enforced by bureaucracies dedicated to ensure the collection of taxes and the detection and punishment of those attempting to evade taxes.

As the Court noted more than eighty years ago in *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 225-226 (1939):

> The production of weak evidence when strong is available can only lead to the conclusion that the strong would have been adverse. (citations omitted) Silence then becomes evidence of the most convincing character.

The origin of Plaintiffs' cannabis cannot be disputed, nor can Plaintiffs' licensure of their cannabis be disputed. The Court's *ratio decidendi* for invoking the commerce clause can no

longer suffice to impugn the sovereignty of thirty-seven states, i.e. "enforcement difficulties" in determining the provenance of the cannabis. That thirty-four states have legislated and created their enforcement bureaucracies to track and tax cannabis through its origin and every step of its journey to the ultimate consumer vitiates that singular rationale. Accordingly, Plaintiffs' cannabis and their intrastate cannabis manufactured, distributed, sold and possessed pursuant to state law can no longer be prohibited by the CSA unless it is actually transported in interstate commerce.

V. Conclusion

For all the foregoing reasons, there is no longer a rational basis for the application of the Controlled Substances Act to cannabis licensed, grown, manufactured, distributed, sold, and possessed in the state of California.

Dated: November 17, 2020

SCOTT LAW FIRM

By: /s/ John Houston Scott
John Houston Scott
Attorney for Plaintiffs

Dated: November 17, 2020

WILLIAM A. COHAN, P.C.

By: /s/ William A. Cohan
William A. Cohan
Attorney for Plaintiffs