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

Defendants.

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS COUNTY OF MENDOCINO'S, JOHN MCCOWEN'S, CARRE BROWN'S, AND GEORGEANNE CROSKEY'S MOTION TO DISMISS

Date: December 11, 2020
Time: 10:00 a.m.
Courtroom: 1, 17th Floor, 450 Golden Gate Ave., San Francisco, CA
Judge: The Honorable Susan Illston

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I. INTRODUCTION

Factually, the County defendants' (hereinafter "the County") motion to dismiss is based entirely on a false and/or disputed interpretation of Ordinance No. 4381, adopting Chapter 10A.17 of the Medical Cannabis Cultivation Ordinance. The County asks this court to take judicial notice of the Ordinance. The Plaintiffs do not object to the court taking judicial notice of the Ordinance in effect during 2017. (Document 34-1, pages 174 to 191) The County then asks this court to ignore the plain language of the Ordinance by giving "substantial judicial deference" to the County's absurd interpretation of its plain language.

The "Frequently Asked Questions" ("FAQ") relied upon by the County is not subject to judicial notice. Second, the questions and answers can easily be interpreted to support Plaintiffs' allegations. The first question and answer confirm that "a pathway for a cultivator to obtain a permit for a cultivation site other than the one which is the 'prior cultivation site'" is "through the relocation process identified in MCC §10A17.080(B)(3)." The next question relates to (B)(1) applicants as opposed to (B)(3) applicants. It provides that the applicant must show proof of prior cultivation at the current location prior to 1/1/16. (Document 34, p. 16)

The County relies on this false and misleading interpretation of the Ordinance and the FAQ's in an attempt to explain the letter sent to the Plaintiffs on July 9, 2018 denying their permit. (Document 31, FAC, Ex. G) The denial letter states that the Plaintiffs' application was denied on the basis they were (B)(1) applicants who did not provide evidence of prior and current cultivation activities for the same parcel. The County then goes on to argue, contrary to the plain language of the Ordinance, that plaintiffs did not qualify for a Phase One permit as (B)(3) applicants. This is a blatant attempt to perpetrate a fraud on the court given the clear language in the ordinance that Phase One includes both (B)(1) and (B)(3) applicants.

As to the "opt-out" zone, the Plaintiffs have alleged they were targeted in the creation of an "opt-out" zone that was designed to prohibit them from cultivating cannabis on their property. There was no legitimate reason for the change in zoning and it was based on impermissible motives. (FAC, ¶ 49) On information and belief, the Plaintiffs have also alleged that this was

the first time a County in the State of California created an opt-out zone in the zoning plan that prevented a property owner from cultivating cannabis based solely on the vote of the neighbors. Id.

It has always been understood [as] one of the simplest [principles] in human experience that a party's falsehood or other fraud in the preparation and presentation of his cause…and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the causes lack of…merit. *U.S. v. Philatelic Leasing*, 601 F.Supp. 1554, 1565 (SDNY 1985, aff'd 794 F.2d, 781 (2nd Cir. 1986)).

Here, the process of creating the opt-out zone targeting the Plaintiffs included the creation of a committee, comprised of plaintiffs' neighbors, who voted to opt-out their neighborhood from the Ordinance. Otherwise the existing zoning plan (agricultural/AG40) would allow the plaintiffs to cultivate cannabis on their property. This was the only AG40 zoned property in the County so affected. The only other opt-out zone created in December 2018 was a residential community (Deerwood CP District) including a Homeowner's Association that voted to opt-out. In contrast, the plaintiffs and their neighbors were zoned agricultural and were not part of a Homeowner's Association.

The County argues that federal law does not recognize a property interest in a local permit to cultivate cannabis. Yet, in making this argument the County does not attempt to address the factual-legal analysis regarding this issue in the FAC at paragraphs 22 to 27. Rather, the County relies on dated, unpublished decisions that do not address the facts or legal arguments raised in this case, including whether the interstate commerce clause, relied upon in 2005 in *Gonzalez v Raich*, still applies to the facts in this case. Since 2012 thirty-four (34) states and the District of Columbia have created a property interest limited to intrastate commerce by laws legalizing, licensing, and taxing production, manufacturing, distribution, sale and possession of cannabis. The Court's rationale for imposing federal cannabis prohibition was premised on the fact that in 2005 only California permitted production and possession of Cannabis.

The remaining legal argument raised in the County's motion to dismiss is based on the doctrine of *ex Turpi Causa Non Oritur Actio*. The false premise underlining this defense is established by the actions of thirty-four (34) states, nullifying interstate commerce to justify intruding on state sovereignty and the will of the people protected by the Tenth Amendment. In addition, Plaintiffs complied with Rule 5.1(a)(1)(A) by filing and serving a "notice of constitutional question" on November 17, 2020. (Document 42)

The Plaintiffs also note that County Counsel has appeared on behalf of Defendants John McCowen, Carre Brown and Georgeanne Croskey in their official capacities, but not as individuals. Accordingly said defendants cannot raise immunities that might otherwise be available. *Bateson v Geisse*, 857 F.2d 1300, 1304-05 (9th Cir. 1988). The County Defendants do not contest the adequacy of the conspiracy allegations relating to certain County officials and a third party, Sue Anzilotti.

II. FACTS ALLEGED

The plaintiffs, unlike the County, set forth verbatim what is alleged in the FAC. This demonstrates the extent to which the County has mischaracterized and misrepresented what the Plaintiffs have alleged.

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 on a private road off Boonville Road. It was ideal because it was zoned AG40/Agricultural 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. (FAC ¶ 12).

While in escrow the plaintiffs hired Bob Franzen of Redwood Water System to perform a well test. They learned the water well produced 22 Gallons Per Minutes and was dug 30 feet deep. The plaintiffs also consulted with three licensed cannabis farmers who visited the site. (FAC ¶ 13).

Plaintiffs' property was zoned agricultural (AG40) as opposed to residential, commercial, recreational, environmental or other designated purpose. From a zoning perspective the plaintiffs were desirable applicants. On May 1, 2017 plaintiffs completed their application to cultivate medical cannabis. On May 4, 2017 – while accompanied by an attorney – plaintiffs met with Commissioner Diane Curry and Christina Pallman of her staff. Their B-3 application to relocate to a new site was conditionally approved by Commissioner Curry based on the information contained in the application, documents provided, and proof of prior cultivation experience. (FAC ¶ 14).

Plaintiffs were given an "Application Receipt" signed by Commissioner Curry dated May 4, 2017. See Exhibit A attached. It is essentially a temporary permit. 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." The plaintiffs were told by Commissioner Curry they could immediately begin cultivation activities; and they did. (FAC ¶ 15).

During 2017 and prior to her resignation in March 2018 Commissioner Curry was given broad discretion as the final decisionmaker for the County of Mendocino to interpret and implement the new ordinance allowing qualified applicants to receive permits to cultivate cannabis in the County. During that time Commissioner Curry approved permits for numerous (B)(3) applicants, including but not limited to the plaintiffs, to immediately cultivate cannabis on relocation sites in the County so long as the relocation site met zoning requirements. (FAC ¶ 16).

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. (FAC ¶ 29).

On or about September 16, 2017 Plaintiffs were contacted by Commissioner Curry and notified their permit application was finally 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 in

order to receive the (B)(3) permit issued by Commissioner Curry they needed to provide additional proof that the site of prior cultivation in Willits was no longer able to resume cannabis cultivation. No other reason was given for being denied a permit. 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. (FAC ¶ 30).

Beginning on or about November 2017 defendant Sue Anzilotti colluded with her neighbors and conspired with defendants John McCowen, Carre Brown and Georgeanne Croskey to cause the County to create an "opt-out" zone that would change the County zoning plan. It was intended to target the Plaintiffs and preclude them from cultivating cannabis on their property. In January 2018 the County initiated a sham process to create opt-in and opt-out zones in the County regarding the cultivation of cannabis. County officials intentionally excluded plaintiff Chris Gurr from participating in the process as well as other residents who were not opposed to plaintiffs' cultivation of cannabis. (FAC ¶ 31).

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. (FAC ¶ 33).

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 premise and contrary to the decision of Commissioner Curry. (FAC ¶ 35).

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 determined by Commissioner Curry in May and September 2017. (FAC ¶ 36).

The Plaintiffs are the only AG40 applicants who complied with all (B)(3) requirements, as determined by Commissioner Curry as the final decisionmaker for the County, but were later informed their application had been denied. (FAC ¶ 37).

The "opt-out" amendment included as part of Ordinance No. 4420, (Exhibit H attached), Section 11, at page 24, targeted only two neighborhoods in the entire County. Of the two, the plaintiffs' property was located in the Boonville/Woodyglen CP District, an area zoned agricultural. This unprecedented political experiment gave a right to plaintiffs' neighbors to decide whether to "opt-out" of the zoning plan and thus prevent plaintiffs from exercising their right to cultivate cannabis on their property. Plaintiffs were the only qualified persons in an agricultural zone in the County adversely affected by the "opt-out" amendment to the zoning plan. (FAC ¶ 48).

In furtherance of the conspiracy, on December 4, 2018 a new ordinance was passed by defendants John McCowen, Carre Brown and Georgeanne Croskey. It created an "opt-out" zone designed to prohibit the plaintiffs from cultivating cannabis on their property. This zoning decision was made for no legitimate reason and was based on impermissible motives. On information and belief, this was the first time a County in the State of California created an opt-out zone in the zoning plan that prevented a property owner from cultivating cannabis based solely on the vote of neighbors. (FAC ¶ 49).

III. ARGUMENT

A. Motion to Dismiss - 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 (2007). The court must draw inferences in favor of the plaintiff, and 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 (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 (1974). 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. Conversion of a Motion to Dismiss to a Motion for Summary Judgment

The County has have submitted a Request for Judicial Notice in support of its motion to dismiss. In response, Plaintiff has submitted the declaration of Diane Curry, former Interim Commissioner of the Department of Agriculture for the County of Mendocino, disputing the County's interpretation of the Ordinance thus raising triable issues of material fact.

The court is bound to accept as true allegations in the complaint on a motion to dismiss. As a general rule, a district court may not consider any material beyond the pleadings in ruling on

a Rule 12(b)(6) motion. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). A motion to dismiss made pursuant to Rule 12(b)(6) must be treated as a motion for summary judgment under Rule 56 if either party to the motion to dismiss submits materials outside of the pleadings in support of, or in opposition to, the motion, and if the court relies on those materials. *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996).

However, the Court has discretion either to consider or reject such evidence. *Swedberg v. Marotzke*, 339 F.3d 1139, 1143-46 (9th Cir. 2003). Where the district court does not rely on the materials submitted outside the pleadings, a motion to dismiss need not be converted into a motion for summary judgment. Id. If a court converts a motion to dismiss into a motion for summary judgment, the court must give the parties notice and a reasonable opportunity to supplement the record. *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1408 (9th Cir. 1995); see also Rule 56(d), F.R.Civ.P.

The County argues: "During Phase I, applicants are allowed to move an existing cultivation site to a more suitable location through a process called "Relocation." MCC §10A.17.080(B)(3). This process, however, is not intended to create new cultivations sites during Phase I." (Document 34, at 15:13-15) The County then misinterprets the plain language in Section (B)(3) and claims; "The effect and purpose of these requirements is that, during Phase I, *existing* cultivators are allowed to move their cultivation sites to more suitable locations, but *new* cultivation is not allowed." (Id. at 15:22-24).

This argument is refuted by the plain language of the Ordinance. Subsection (A)(1) of Section 10A.17.080, relating specifically to Phase One, provides as follows: "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."

In addition, the plaintiffs' allegations are also supported by admissible evidence, i.e., Ex. A to the FAC (an Application Receipt which states "the garden at this site is considered to be in compliance, or working towards compliance until such time as a permit is issued") and Ex. D to

the complaint (an agreement, requested by the County, not to resume cannabis cultivation in order to satisfy section 10A.17.080(e) of the Ordinance).

Section 10A.17.080(e) provides as follows: "Prior to the issuance of a Permit to cultivate cannabis for a medical use at the destination parcel, the applicant shall provide the Agricultural Commissioner with an agreement, on a form approved by the Agricultural Commissioner and County Counsel, providing that the applicant releases any right to continue or resume cultivation of medical cannabis on the origin parcel."

Subsection (f) provides as follows: "If a person is granted a Permit for a destination site, any claims of proof of prior cultivation on the origin site shall be effectively transferred to the destination site, and the ability to claim proof of prior cultivation at the origin site shall be extinguished."

Notably, subsections (e) and (f) referred to above fall under the section in 10A.17.080 entitled "Requirements specific to Phase One Permits" – not under the section entitled "Requirements specific to Phase Three Permits."

In its motion to dismiss, at page 17, the County attempts to avoid addressing the inferences to be drawn from Exhibit D, "Agreement Not to Resume Cannabis Cultivation" to satisfy section 10A.17.080(e). This document, together with subsections(e) and (f), undermines the County's argument. These are not legal conclusions; rather, these are undisputed facts.

The County also asks this court to ignore allegations in the FAC, at paragraph 16, that Commissioner Curry "was given broad discretion as the final decision maker for the County of Mendocino to interpret and implement the new ordinance allowing qualified applicants to receive permits to cultivate cannabis in the County. During that time Commissioner Curry approved permits to numerous (B)(3) applicants, including but not limited to the plaintiffs, to immediately cultivate cannabis at relocation sites in the County so long as the relocation site met zoning requirements."

Thus, the County has created a factual dispute and asks this court to adopt its self-serving

and irrational interpretation of the Ordinance despite allegations, supported by admissible evidence, that Commissioner Curry, as final decision maker for the County, interpreted and implemented the Ordinance consistent with the plain language of the Ordinance and plaintiffs' allegations.

The factual dispute created by the County defendants is best summarized at page 16 of their motion; "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." Should the court accept this invitation this motion should be treated as a motion for summary judgment. For that the reason the Plaintiffs are filing, concurrently with this opposition, the Declaration of Diane Curry, who was Commissioner of Agriculture at the time Plaintiffs submitted their license application. This declaration supports the Plaintiffs' allegations and directly refutes the absurd interpretation of the Ordinance advanced by the County. The court must draw inferences in favor of the non-moving party. The Curry declaration raises triable issues of material fact precluding summary judgment.

C. The Class of One Equal Protection Claim

The purpose of the Fourteenth Amendment is to protect individuals from arbitrary and intentional discrimination. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000). A successful equal protection claim can be brought by a "class of one" when plaintiff "alleges that she has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment." Id. However, such claims must show that the plaintiff was discriminated against intentionally, rather than accidentally or randomly. *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 486 (9th Cir. 2008); *Gerhart v. Lake County, Montana*, 637 F.3d 1013, 1022-23 (9th Cir. 2011); see also, *Shanko v. Lake County*, 116 F.Supp.3d 1055, 1063 (N.D. Cal. 2015) Here, the Plaintiffs were similarly situated to other qualified (B)(3) applicants during Phase One and were the only qualified applicants denied a permit. (FAC, ¶ 37) In addition, the Plaintiffs have alleged they were "the only qualified persons in an agricultural zone in the County

adversely affected by the 'opt-out' amendment to the zoning plan." (FAC, ¶ 48). These are facts, not legal conclusions.

The County's motion is based on a gross mischaracterization of what is alleged. In addition, the County defendants invite the court to ignore facts alleged in the FAC, accept their absurd interpretation of the plain language in the Ordinance, and draw inferences in their favor. (Motion, pp. 13-17) The County argues, without the support of any allegations in the FAC or in the Ordinance, that; "Based on the allegations in Plaintiffs' complaint, it is clear they did not qualify for a Phase I permit under MCC §10A.17.080(B)(3) because they were attempting to license or relocate a permissible *existing* cultivation site." (Document 34, at 16:20-22) As is clearly alleged, the Plaintiffs provided the requisite proof of prior cultivation prior to January 2016 as part of their (B)(3) application to relocate to a new destination site. The origin site identified in Phase One required proof of prior cultivation at a site of origin, not an "existing" cultivation site. MCC §10A.17.080.

The County then falsely claims that Plaintiffs assert "that their application did not need to comply with the proof of prior cultivation requirements in Mendocino County Code section 10A.17.080(B)(1) …". (Document 34, at 17:9-11). Again, the opposite is alleged. (FAC, ¶ 30; see also Exhibit D) The Plaintiffs submitted a signed agreement stating that they would not continue cultivation activities at the prior cultivation site as required by the Ordinance, section (B)(3) (e)and (f). Rather, Plaintiffs have alleged they complied with the requisite "proof of prior cultivation" condition required of all applicants during Phase One. (FAC, ¶¶ 14, 15 and 29).

The court need only read the plain, unambiguous language in the Ordinance at section 10A.17.080 to realize the County defendants are misrepresenting what is clearly written. This is then compounded by the gross misrepresentation of what is alleged in the FAC.

D. The Substantive Due Process Claim

The law is clearly established that state law creates property rights for purposes of Section 1983. *Board of Regents v. Roth*, 408 U.S. 564 (1972). The premise for asserting cannabis is

contraband *per se* and *ipso facto* ineligible for property rights in its possession, licensing for production, distribution and sale is the Court's decision in *Gonzales v. Reich*, which is based entirely on the legal conclusion that cannabis grown and possessed in California is deemed part of interstate commerce. Since 2005 when *Gonzales v. Reich* was decided, thirty-four (34) states have legalized and licensed intrastate production, distribution, sale and possession of cannabis. Congress has no jurisdiction to interfere with California's intrastate cannabis laws or plaintiffs' property rights based thereon.

A substantive due process claim does not require proof that all use of the property has been denied. *Herrington v. County of Sonoma*, 834 F.2d 1488, 1498 (9th Cir. 1988). Rather, it must be alleged that the interference with property rights was irrational or arbitrary. *Usery v. Turner elkhorn Mining Co*., 428 U.S. 1 (1976); *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528 (2005).

The refusal to issue a land use permit after an individual has satisfied all of the requirements made on the permit can state a claim for arbitrary and capricious government action which deprives the plaintiff of his substantive due process rights. *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988); *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990).

Here, the Plaintiffs have alleged that the County denied their application for a permit to cultivate cannabis in an arbitrary and irrational manner sufficient to state a claim for a violation of substantive due process. In addition, Plaintiffs have alleged their property rights were infringed through an opt-out amendment to the zoning plan that was arbitrary and irrational.

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

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.")

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

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

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)

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.

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.

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.

1. 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.

2. 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 "marijuana" 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. . .”

3. 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 Substances 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-four (34) states, i.e. "enforcement difficulties" in determining the provenance of the cannabis. That thirty-four (34) 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.

Defendants' reliance on the 2005 decision in *Gonzales v. Raich* is reducible to requiring this Court to deny recognition to the changes in law and fact concerning intrastate commerce in cannabis after 2005. Thirty-four states including California have created property interests in intrastate cannabis by licensing production, distribution, sales and possession. As the Court held in *Murphy v. NCAA*, 138 S.Ct. 1461 (2018), in striking down federal prohibition of New Jersey's intrastate gambling laws, neither Congress nor the courts can deny the rights reserved to the states and the people by the Tenth Amendment, *nor ipse dixit* obscure the reality of intrastate commerce

by falsely insisting intrastate commerce is interstate commerce.

IV. CONCLUSION

For the foregoing reasons the defendants' motion to dismiss the plaintiffs' First Amended Complaint should be denied in its entirety, or, plaintiffs should be granted leave to amend. Alternatively, should the motion to dismiss be converted to a motion for summary judgment, the County's motion for summary judgment should be denied in its entirety.

Dated: November 20, 2020

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Dated: November 20, 2020

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