No. 22-15673

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs - Appellants,

vs.

COUNTY OF MENDOCINO, et al.,

Defendant - Appellee.

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

On Appeal from the Decision of the United States District Court
for the Northern District of California, Case No. 3:20-cv-04537-SI
The Honorable Susan Illston

John Houston Scott
SCOTT LAW FIRM
1388 Sutter Street, Suite 715
San Francisco, CA 94109
Telephone: (415) 561-9601
Facsimile: (415) 561-9609

William A. Cohan
WILLIAM A. COHAN, P.C.
2888 Loker Ave., E, Suite 202
Carlsbad, CA 92010
Telephone: (442) 325-1111
Facsimile: (442) 325-1126

Attorneys for Plaintiffs – Appellants ANN MARIE BORGES
and CHRIS GURR

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

MISCELLANEOUS

INTRODUCTION

This appeal raises the issue identified in the Statement of Justice Thomas respecting the denial of certiorari in *Standing Akimbo, LLC v. United* States, 141 S.Ct. 2236, 210 L.Ed.2d 974 (2021): whether the Court's holding in *Gonzales v. Raich,* 545 U.S. 1 (2005), that prohibiting strictly intrastate commerce in cannabis can still be justified notwithstanding the facts that: (1) ". . . federal policies of the past 16 years have greatly undermined [Raich's] reasoning . . ." 141 S.Ct. at 2236 and (2) ". . . 36 States allow medicinal marijuana use and 18 of those States also allow recreational use." 141 S.Ct. at 2237. Justice Thomas noted that ". . . the Federal Government's current approach is a half-in, half-out regime that simultaneously tolerates and forbids [intrastate commerce in] marijuana. This contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary." 141 S.Ct. 2236-37.

Plaintiffs-appellants ("plaintiffs" or "appellants" hereinafter) herein are among the many victims of these traps because, notwithstanding appellants' complete compliance with California's comprehensive cannabis licensing and taxing legislation constituting exclusively intrastate commerce, appellants have been wrongfully deprived of their property by agents of Mendocino County, California, and the lower court held that appellants were barred from pursuing their only remedy based on 42 U.S.C. §1983 because they do not have a federally

recognized property right to cultivate cannabis notwithstanding their license to do so pursuant to state law.

The paradox presented by conflicting state and federal laws, compounded by the federal equivocations discussed in Justice Thomas's excerpted "Statement," constitute a conundrum readily resolved by confining Federal jurisdiction to the constitutional authority on which it is based: interstate commerce. The *Raich* Court held that prohibiting any intrastate use was "necessary and proper" to avoid a "gaping hole" in the Controlled Substances Act due to ". . . the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and diversion into illicit channels . . ." *Raich*, 545 U.S. 1, 22 (2005).

Because more than 36 states have implemented comprehensive legislation to create property interests in purely intrastate commerce through licensing, taxation and enforcement agencies developed for that purpose, there is no longer any basis for asserting that ". . . the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere and diversion into illicit channels" can justify the irrebuttable presumption that all cannabis is part of interstate commerce. Instead, by changing the irrebuttable presumption of interstate commerce to a rebuttable presumption which can be overcome by evidence that demonstrates the purely intrastate origin, distribution, sale and/or

possession of any quantity of cannabis, the overbreadth of federal prohibition and consequent interference with purely intrastate commerce can be eliminated legally, logically and practically.

JURISDICTIONAL STATEMENT

This action is brought under 42 U.S.C. section 1983. Jurisdiction of the district court was conferred by 28 U.S.C. section 1331. Judgment was entered on April 18, 2022 after the Defendant's motion for summary judgment was granted as to both of Plaintiffs' equal protection/class of one claims. (ER 1-23) On December 13, 2020 the district court had dismissed the Plaintiffs' due process claims, without leave to amend, on the basis that the Plaintiffs were prohibited from challenging the presumption that all cannabis production, distribution, sales and possession were deemed part of interstate commerce. (ER 24-39) Consequently, notwithstanding compliance with state law, plaintiffs were barred by federal prohibition from pursuing a remedy for the deprivation of a state created property right to legally grow marijuana. The property right/interstate commerce issue also significantly impacted the Plaintiffs' compensable damages available in pursuit of their two class of one claims.

The Plaintiffs timely appealed from the judgment on May 2, 2022. (ER 2187-2230)

ISSUES PRESENTED

1. Whether the irrebuttable presumption of interstate commerce in relation to marijuana grown legally in California, announced in *Gonzales v. Raich*, 545 U.S. 1, at 22 (2005), should now be rebuttable based on nullification of the rationale of *Raich* due to legalization of cannabis production, distribution, sales and taxation in 37 states and the District of Columbia since *Raich* was decided:

   "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 the failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the Controlled Substances Act."

2. Whether the plaintiffs have a property right in order to pursue due process claims based on the arbitrary and irrational denial of a permit and being singled out and targeted for a change in zoning.

3. Whether the plaintiffs submitted sufficient evidence, drawing inferences in their favor, to survive summary judgment regarding two class of one Equal Protection claims.

I. STATEMENT OF THE CASE

A. Introduction

Plaintiffs believe this is a case of first impression since *Gonzales v. Raich,* 545 U.S. 1 (2005) was decided. Numerous decisions have affirmed that a state property right in marijuana is not enforceable in Federal Court in a Section 1983 action because it is contraband per se under federal law. These conclusory, result oriented decisions beg the question – why should an irrebuttable presumption of interstate commerce exist today given that intrastate commerce in marijuana is

legal in 37 states and comprehensively regulated and taxed from seeds to sales in California?

Recognizing that the irrebuttable presumption of interstate commerce is a threshold issue that includes a factual-legal analysis, the Plaintiffs raised the issue in the fact section of their First Amended Complaint. (ER 2102-2186) The Plaintiffs alleged as follows:

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.") (ER 2107)

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. (ER 2107-2018)

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." (ER 2108-2109)

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. (ER 2109)

B. Motion to Dismiss the Due Process Claim is Granted Because the Plaintiffs Cannot assert a Property Right in Growing and Selling Marijuana

The facts alleged in the First Amended Complaint are summarized below. (ER 2102-2186) In 2014 the Plaintiffs Ann Marie Borges and Chris Gurr reconnected at their 40th high school reunion and have been a couple ever since. Ms. Borges spent most of her adult life as a real estate agent in Mendocino County while also working as a professional horse trainer. She had some experience growing marijuana in Mendocino County since the 1980's. Chris Gurr had a 30 year career as a business and franchise owner of IT services in Atlanta, Georgia. (ER 2104-2105)

Chris Gurr relocated to Mendocino County in 2016 to live with Ann Marie Borges. They decided to partner in a business venture to become licensed to legally cultivate marijuana on a suitable farm in Mendocino County. (ER 2105)

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) acre farm they purchased in August 2016 on a private road off Boonville Road. The property 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. They learned the water well produced 22 gallons per minute and was dug 30 feet deep. The plaintiffs also consulted with three licensed cannabis farmers who visited the site. (ER 2105)

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. (ER 2105)

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 Mendocino County Ordinance §10A.17.080(B)(3) license application to grow marijuana at their a new site near Boonville Road was conditionally approved by Commissioner Curry based on the information contained in the application, documents provided, and proof of prior cultivation experience. (ER 2105)

Plaintiffs were given an "Application Receipt" signed by Commissioner Curry dated May 4, 2017. 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. During 2017 and prior to her resignation in March 2018, Agriculture 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. (ER 2106).

Beginning on or about June 20, 2017 Mendocino County Sheriff's Department employee Sue Anzilotti contacted Steve White of the California Department of Fish and Wildlife (CDFW) on behalf of "concerned homeowners" who lived adjacent to Plaintiffs' property. She made false allegations that the water source for Plaintiffs' approved cultivation site was not approved for use in commercial cultivation operations. Steve White, in furtherance of a conspiracy with Anzilotti, decided to use a false allegation of illegal water diversion to obtain a search warrant authorizing seizure of evidence of illegal water diversion. (ER 2106)

On August 10, 2017 at approximately 10:30 a.m. a convoy of CDFW vehicles arrived at Plaintiffs' property and agents, with guns drawn, immediately placed the Plaintiffs in handcuffs. Plaintiffs informed Steve White, the CDFW team leader, they had an application receipt from the County and were in full

compliance with all County regulations. They also informed White that they were awaiting a report from Alpha Labs for tests to determine whether the creek water was supplying the well water. The CDFW team, without any evidence, claimed they believed the water was being diverted from the nearby creek and proceeded to cutdown and remove marijuana, i.e., 100 plants growing indoors under a hoop and 171 plants growing outdoors in an approved location of 10,000 square feet. The garden was within County guidelines and took up approximately one quarter acre on the 11 acres farm. (ER 2107)

During the August 10, 2017 search and seizures CDFW agent Mason Hemphill, under the direction and supervision of Steve White, searched the property and the home of the plaintiffs. Agent Hemphill took custody and possession of a 10 pound random marijuana sample, 163 living marijuana plants and 98 living marijuana plants. During discovery appellants determined that evidence reflecting the chain of custody and proof of destruction of the Plaintiffs' marijuana, consistent with H & S Code section 11479, did not exist. (ER 2107) According to Lt. Steve White at his deposition, it was his and his agency's custom and practice in hundreds of similar raids not to document how, when or where

marijuana seized from citizens was stored, transported or destroyed after it was seized.[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. The law enforcement officers failed to seize any evidence of water diversion during the raid, as Hemphill conceded during his deposition. (ER 2107)

The plaintiffs had the right to cultivate and distribute cannabis subject to the restrictions contained in the temporary permit issued by Commissioner Curry on May 4, 2017. On or about September 16, 2017 Plaintiffs were contacted by Commissioner Curry and notified that their permit application was finally re-approved based on a different origin site. On September 19, 2017 the Plaintiffs went to Commissioner Curry's office to pick up the permit. (ER 2110)

The anticipated handoff was prevented by Deputy County Counsel Matthew Kiedrowski. He informed the Plaintiffs that in order to receive the (B)(3) "relocation" 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 denying the permit.

[1] See *Flatten v. Smith*, 2022 U.S. Dist. LEXIS 78259 (4/29/22), on appeal to the U.S. Court of Appeals for the Ninth Circuit, Case No. 22-15741.

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. (ER 2110; FAC, Ex. D at 2148-2150) Appellants anticipated their permit would then be delivered.

After completing and submitting Cal Cannabis applications, on January 23, 2018 the Plaintiffs received a Temporary Cannabis Cultivation License from the California Department of Food and Agriculture. (ER 2111; FAC, Ex. F at 2157) This was issued following a close examination and inspection of the Appellants' real property and water supply by the CDFW, the State Water Resources Control Board, and the State Department of Food and Agriculture.

1. The Denial of the Permit was the Arbitrary and Irrational Taking of a Property Right Without Due Process

In or about March 2018 Diane Curry left her position as Interim Commissioner of the Department of Agriculture. On July 9, 2018 the County of Mendocino, Department of Agriculture mailed a letter to the Appellants 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 Ordinances 10A.17.080. This denial was based on a false premise and contrary to the decision of Commissioner Curry. (ER 2113)

The Appellants never applied for a cannabis cultivation permit pursuant to paragraph (B)(1) of the County Ordinance. Rather, Appellants' 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 Appellants met all of the (B)(3) requirements as determined by Commissioner Curry in May and September 2017. The Appellants 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. (ER 2111)

2. The Opt-Out Revision to the Cannabis Ordinance was a Taking of a Property Right in Violation of Due Process

Beginning on or about November 2017 Sheriff's Department employee Sue Anzilotti conspired with her neighbors and County Supervisors John McCowen and Carre Brown to cause the County to create an "opt-out" zone that would slightly revise the County zoning plan. It was intended to and did target the Appellants 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 Appellant Chris Gurr from participating in the process as well as other residents who were not opposed to Appellants' cultivation of cannabis. (ER 2113)

In furtherance of the conspiracy, John McCowen recruited Assistant County Counsel Matthew Kiedrowski to prevent the permit approved by Commissioner Curry from being delivered to the Appellants. The conspiracy then evolved to also include the goal to change the County zoning plan to create an "opt-out" provision targeting the Appellants. As a result of the new ordinance, Appellants were the only qualified persons in the County prohibited from cultivating cannabis in an agricultural zone. (ER 2114)

Beginning on or about November 2017, and in furtherance of the conspiracy, County Supervisors John McCowen and Carre Brown, at the request of Anzilotti and other neighbors of the Appellants, participated in a process to create an "opt-out" zone designed to prevent the Appellants from cultivating cannabis on their property. The "opt-out" amendment included as part of Ordinance No. 4420, Section 11, at page 24, targeted only two neighborhoods in the entire County. Of the two, the Appellants' property was located in the Boonville/Woodyglen CP District, an area zoned agricultural. This unprecedented political expedient purportedly gave a right to Appellants' neighbors to decide whether to "opt-out" of the zoning plan and thus prevent Appellants from exercising their right to cultivate

cannabis on their property. Appellants were the only qualified persons in an agricultural zone in the County adversely affected by the "opt-out" amendment to the zoning plan. (ER 2114)

C. The District Court Drew Inferences in Favor of the Non-Moving Party in Granting Summary Judgment

On July 9, 2018 the County sent the Appellants a letter stating that their application was denied because "the prior and current activities are not occurring on the same parcel." (ER 2111; FAC, Ex. G at 2159-2160) The Plaintiffs demonstrated that section (B)(3) of the Ordinance contradicts this interpretation. It clearly states that an applicant may obtain a "relocation" permit with proof of cultivation "not on the site previously cultivated (the 'origin' site) but on different legal parcel (the 'destination' site)" subject to certain requirements. It includes a provision that "the origin site shall be restored." (ER 2113-2114; FAC, Ex. H at 2166-2169)

Commissioner Curry had previously approved the Willits site as the origin site and the Plaintiffs were required by County Counsel to submit an "Agreement Not to Resume Cannabis Cultivation" at the Willits site. As instructed the Appellants retained a land use attorney and submitted the requested agreement. (ER 2110; FAC, Ex. D at 2148-2150) At no time were the Appellants informed that they were required to produce additional evidence of prior cultivation activities, nor was that the reason stated to deny the permit.

Apparently realizing the futility of their first pretext, the County proffered a new pretext by raising for the first time when seeking summary judgment the claim that the Plaintiffs did not submit sufficient evidence of prior cultivation at the origin site in contrast to other (B)(3) applicants who obtained permits to relocate to a new site. The County also disclosed for the first time that there were over one hundred (B)(3) applicants who were granted relocation permits to cultivate at a new site -- contradicting the only reason given to deny the permit.

In moving for summary judgment, the County asserted that the Appellants could not prove they were singled out and treated differently because, according to the County, the other (B)(3) relocation applicants submitted more evidence of prior cultivation at the origin site as compared to the Appellants. In other words, the July 9, 2018 notice was concededly false and a pretext to deny the permit, but now the County had a new excuse.

The district court bought the new defense hook, line and sinker, granting summary judgment because the Appellants could not prove they provided sufficient evidence of prior cultivation at the Willits site in 2017. It is undisputed that the Appellants were not asked for additional evidence of prior cultivation when the provisional permit was issued in 2017, and the permit was not denied in July 2018 for that reason. In short, the County moved the goal posts and the district court went along with it.

II. SUMMARY OF THE ARGUMENT

This appeal raises the issue of whether the irrebuttable presumption of interstate commerce announced in *Gonzales v. Raich* is still viable given today's new context, i.e., marijuana is now legal in 37 states -- and is comprehensively regulated and taxed -- including California. Given the new landscape, applying the rationale used by the Supreme Court in *Gonzales v. Raich,* persons qualified to grow and legally sell marijuana in California should have the right and opportunity, at the very least, to rebut the presumption of interstate commerce and prove the marijuana in question is part of intrastate commerce.

Here, a neighbor employed by the Sheriff (Sue Anzilotti) with friends in high places was able to persuade and influence (1) Lt. Steve White of CDFW and Sgt. Bruce Smith of the Mendocino County Sheriff's Office to seize Appellants' licensed and permitted marijuana; (2) the new Commissioner of Agriculture to deny the permit previously issued by Commissioner Curry and more recently approved by the State of California; and (3) the Board of Supervisors to revise the Cannabis Ordinance to create an "opt-out" zone that targeted the Appellants as the only persons zoned agricultural in the County who could not cultivate cannabis on their property.

The district court granted the County's motion to dismiss the due process claim(s) on the basis that the Appellants did not have a property right to grow or

sell marijuana. The district court cited cases holding that, under federal law, cannabis is contraband *per se.* The court did not address the issue of whether the rationale of *Gonzales v .Raich* still applies given the fact that marijuana is now legal in 37 states and is now closely regulated and taxed, including California -- contrary to the facts presented in *Gonzales.*

The district court granted the County's motion for summary judgment as to the Equal Protection/class of one claims by drawing inferences in favor of the County while the County, with the power to produce stronger evidence, could not identify any person similarly situated to the Appellants (1) who was denied a permit after being approved by Commissioner Curry and (2) who was prevented by a targeted revision in the Cannabis Ordinance from cultivating cannabis on property zoned agricultural.

III. STANDARD OF REVIEW

On appeal from a motion to dismiss the court must accept the plausible facts alleged as true and review the lower court's decision *de novo.* *Gonzalez v. Metropolitan* Transportation *Authority,* 174 F.3d 1016 (9th Cir. 1998); *Johnson v. Terhune*, 234 F.3d 1277 (9th Cir. 2000). The law applicable to a motion to dismiss is set forth in more detail in the Plaintiffs' opposition to the County of Mendocino's motion to dismiss. (ER 2064)

On appeal from an order granting summary judgment the court reviews issues of law *de novo* and factual findings for clear error or an abuse of discretion. *Pierce v. Underwood,* 487 U.S. 552 (1988). The law applicable to a Rule 56 motion for summary judgment is set forth in greater detail in Plaintiffs' opposition to the County's motion for summary judgment. (ER 113-114).

IV. ARGUMENT

A. The Irrebuttable Presumption of Interstate Commerce is No Longer Valid

In *Borges v. County of Mendocino*, 503 F.Supp.3d 989 (N.D. Cal. 2020) the district court did not squarely address the interstate versus intrastate commerce issue raised by the Plaintiffs. Rather, the district court's analysis begins with reliance on *Schmidt v. County of Nevada.*, 2011 WL 2967786 (E.D. Cal. 2011), citing *U.S. v. Jeffers*, 342 U.S. 48, 53 (1951) for the proposition that marijuana is contraband per se. In 2005 the court in *Gonzales v. Raich* found there was an irrebuttable presumption that marijuana grown in California affected interstate commerce. For that reason alone, marijuana grown in California is presumed to be contraband per se. The Appellants challenge that presumption as no longer legitimately irrebuttable.

The other authorities relied upon by the district court (*Kent v. County of Yolo*, 411 F.Supp.3d 1118, 1123 (E. D. Cal. 2019); *Grandpa Bud, LLC v. Chelan County Wash*., 2020 WL 2736984 (E.D. Wash. 2020); and *Allen v. County of Lake*,

2017 WL 363209 (N.D. Cal. 2017) do not address the interstate commerce issue raised herein. Rather, the proffered legal analysis is tautological: marijuana is contraband because it affects interstate commerce. Accordingly, the Appellants appeal to this court to address the threshold issue: given the fact that marijuana is legal in 37 states -- comprehensively regulated and taxed -- including California, is the irrebuttable presumption of interstate commerce no longer rational and, consequently, should that presumption be rebuttable.

Denying Appellants' property rights in their state-licensed cannabis because "...it remains illegal under federal law..." and is, therefore, "contraband per se" is circular reasoning. Because Appellants produced and possessed their cannabis in compliance with state law in intrastate commerce, Appellees cannot prove Appellants' cannabis had or would have had an impact on interstate commerce. The district court refused to recognize the limits of federal legislative and judicial jurisdiction over exclusively intrastate commerce. The Supreme Court in *Gonzales v. Raich* acknowledged the limits on federal power, which extended to California-produced cannabis twenty years ago only because of "the difficulties in distinguishing between locally grown cannabis and cannabis grown elsewhere." Those difficulties can be addressed by requiring state licensees to establish that their cannabis is produced, processed, possessed, distributed, sold and taxed in compliance with state law, limited to intrastate commerce.

With certain narrow exceptions, state law creates a property right for purposes of Section 1983. *Board of* Regents *v. Roth,* 408 U.S. 564 (1972). Under state law the Appellants' property right vested when they obtained a provisional permit and began to legally cultivate marijuana. Where a person's property is taken by the government, the due process clause of the Fourteenth Amendment requires some kind of notice and hearing. In many cases, a pre-deprivation hearing is required. *Fuentes v. Shevin,* 407 U.S. 67, 81-82 (1972).

The presumption of interstate commerce became irrebuttable in 2005. However, given the new landscape in 2022 which includes marijuana being legal in 37 states including the states that border California, that presumption should now be rebuttable.

In *United States v. Bass,* 404 U.S. 336 (1971) criminal defendant Bass, a convicted felon, was prosecuted and convicted for being in possession of a pistol and then a shotgun. There was no allegation in the indictment and no attempt by the prosecution to show that either firearm had been possessed "in commerce or affecting commerce." *Bass,* at 338.

The Omnibus Crime Control and Safe Streets Act includes a section that made the (1) receipt, (2) possession or (3) transport in commerce of any firearm by a convicted felon a crime. Following a conviction for this offense in the district court, Bass appealed. The Second Circuit held that the statute required a narrow

reading and that a nexus with interstate commerce must be shown with respect to all three offenses. The Supreme Court affirmed and set aside the conviction "because the government has failed to show the requisite nexus with interstate commerce." Id. at 347. The Court affirmed the principle that absent proof of some interstate commerce nexus the federal statute dramatically intrudes upon traditional state criminal jurisdiction. Id. at 350. The Court went on to note that the Federal Government can meet its burden to prove a nexus with interstate commerce in a variety of ways. Id. See also; *U.S. v. Alderman*, 565 F.3d 641 (9th Cir. 2009), cert denied, 562 U.S. 1163 (2011) (jury to decide nexus with interstate commerce re prosecution of felon in possession of body armor); *U.S. v. Garcia*, 768 F.3d 822 (9th Cir. 2014) (jury to decide nexus with interstate commerce re prosecution for damage to building and car from pipe bomb).

Based on legalization, taxation and comprehensive regulation by 37 states, including California, Appellants' possession of their marijuana should not be a federal crime unless it has a nexus with interstate commerce. It follows that the legal possession of marijuana in California is a state property right that can be enforced in federal court under Section 1983 if the Appellants can rebut the interstate commerce presumption. The Appellants should have the opportunity to rebut the presumption and have the jury decide if there exists a nexus between the Appellants' licensed, regulated and taxed marijuana and interstate commerce.

1. Appellants' were Lawfully Growing Marijuana Regulated, Licensed and Taxed by the State of California, Rebutting the Presumption of Interstate Commerce

The State of California 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) to explain 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. 1 (2005), the Court refused to consider several problems created by California's Compassion Use Act of 1996 and the lack of scientific evidence to support classifying cannabis aka marijuana as a Schedule I narcotic. Instead, the Court narrowly focused on whether Article 1, Section 8 of the United States Constitution -- the interstate commerce clause -- could justify federal prohibition of the production, possession, distribution and sale of cannabis, relying on *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 – unlike *Wickard* -- 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 destined for or 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 -- and 36 other states' -- 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 Appellants had the right to cultivate and distribute cannabis subject to the restrictions and conditions related to the permit issued by Commissioner Curry and the State of California.

2. 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) and 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 *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.

B. Plaintiffs Adequately Alleged Due Process Claims Based on the Deprivation of a Property Right Created by State Law

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); *Shanks v. Dressel*, 540 F.3d 1082, 1087 (9th Cir. 2008) (substantive due process); *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998) (procedural due process). A person can have a constitutionally protected property interest in a government benefit. *Groten v. California*, 251 F.3d 844, 850 (9th Cir. 2001) (protected property right to a temporary appraiser's permit).

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. Raich*, which is based entirely on the legal conclusion that cannabis grown and possessed in California is deemed part of interstate commerce. Unlike 2005 when *Gonzales v. Raich* was decided, thirty-seven (37) states have legalized and licensed intrastate production, distribution, sale and possession of cannabis. Congress has no jurisdiction to interfere with California's -- or 36 other states' -- intrastate cannabis laws or Appellants' 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 Appellants 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, Appellants have alleged their property rights were infringed through an opt-out amendment to the zoning plan that was arbitrary and irrational.

C. Triable Issues of Fact Preclude Summary Judgment as to Appellants' Class of One Equal Protection Claims

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). In *Willowbrook*, the plaintiff alleged that the village demanded a 33-foot easement to connect her property to the municipal water

supply whereas her neighbors were only required to grant a 15-foot easement. The Supreme Court held that 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 issue is not whether the County can articulate a rational basis for denying the permit or changing the zoning; rather, the issue is whether there was a rational basis for treating the Appellants differently. *Willowbrook,* 528 U.S. at 564; *Gerhart*, 637 F.3d at 1023.

In *Gerhart v. Lake County, Montana* the plaintiff built an approach to a county road that borders his property. He was told he needed a permit which was denied by County Commissioners. The denial was remarkable because ten other property owners in his block previously built un-permitted approaches to the county road, all without consequences. When the Commissioners denied Gerhart's permit, he brought suit under Section 1983 alleging that the Commissioners had

violated his due process and equal protection rights. The district court granted summary judgment for the County. *Gerhart*, 637 F.3d at 1015.

As to the "class of one" equal protection claims the court in *Gerhart* held that the district court "erred in holding that no genuine issues of material fact existed and that Gerhart's 'class of one' claim failed as a matter of law." Id. at 1022. Gerhart presented evidence that he was treated differently than other similarly situated property owners in the permit process and ten other property owners on the block were not required to have permits.

In addition, the district court made a crucial error in its analysis of the rational basis requirement for Gerhart's class of one claim. Citing *Willowbrook*, 528 U.S. at 564, the Ninth Circuit noted: "Specifically, the district court analyzed whether there was a rational basis *for denying Gerhart's application*, when it should have analyzed whether there was a rational basis for *treating Gerhart differently*." Id. at 1023. (emphasis in the original).

Here, the district court previously ruled that the allegations "were sufficient to state a claim that plaintiffs were intentionally treated differently than other similarly situated permit applicants without a rational basis." As to the stated reason for denying the permit on July 9, 2018 and related dispute over the interpretation of the plain language of the Ordinance: "The Court finds that the parties' disputes regarding how MCC 10A.17.080(B)(1) and (B)(3) should be

interpreted and whether the County's interpretation is entitled to *Chevron* deference are not amenable to resolution on the present motions to dismiss." (ER 35)

On summary judgment the County of Mendocino abandoned its irrational and indefensible interpretation of the Ordinance and raised a new defense. The County now claims the Plaintiffs were denied the permit for a reason not stated in the July 9, 2018 letter. (ER 274-275). Instead, the latest pretext articulated by the County is that the Plaintiffs did not submit sufficient evidence of prior cultivation at the origin site.

1. The Denial of the Permit

The County of Mendocino denied the Appellants' permit based on an interpretation of the Ordinance that mischaracterized and ignored the clear distinction between (B)(1) applicants who applied for a permit at an "origin site" as distinguished from (B)(3) applicants who relocated from an origin site to a "destination site." The Appellants' permit was purportedly denied for only one stated reason, i.e., "*the cultivation activities taken before and after January 1, 2016, must be on the same legal parcel, and that parcel will become the origin site for purposes of relocation*." (ER 274-275) The absurdity of the County's initial pretext is so self-evident that the district court's failure to acknowledge its significance requires further elaboration, i.e., the definition of "relocation" is the

action of moving to a new place and establishing one's home or business.

Recognizing that the Appellants were the only applicants denied a permit for

this pretextual reason, the County manufactured a new defense theory, i.e., that the Plaintiffs were the only (B)(3) relocation applicants given a provisional permit who did not submit sufficient evidence of prior cultivation at an origin site in order to be approved to relocate to a new site. (ER 2014-2020). This is both irrelevant and inconsistent with the pretext originally presented by the County to justify denying the Plaintiffs' permit., i.e., the cultivation activities prior to January 1, 2016 must be on the same legal parcel that becomes the origin site for purposes of relocation. (ER 274-275) Thus, this newly minted interpretation of the ordinance cannot be taken seriously.

This attempt at rehabilitation was not articulated until the County filed a motion for summary judgment. The County submitted evidence from six other relocation (B)(3) applicants, identified by the Appellants as (B)(3) relocation applicants issued a provisional permit to cultivate at new relocation site, to show that the Appellants were denied a permit because they failed to submit comparable evidence. (ER 2025-2027) However, the Appellants' permit was approved without being asked to submit additional proof of prior cultivation at the Willits site, and the denial letter of July 9, 2018 did not mention this reason. (ER 274-275) If this

was a genuine issue the County of Mendocino could have simply asked for additional evidence of prior cultivation before, or on, July 9, 2018.

This apocryphal defense is also contradicted by the October 2017 request by County Counsel, not Commissioner Curry, that Plaintiffs submit an "Agreement Not to Resume Cannabis Cultivation" at the "origin site" located at 26500 Reynolds Highway in Willits, California. The Plaintiffs hired an attorney and submitted this signed agreement to County Counsel on or about November 1, 2018. (Borges Decl., ER 221-222; Curry Decl., ER 128-133 and Ex. C, ER 175-176) This raises the reasonable inference that as of October 2017 both Commissioner Curry and County Counsel determined that the Plaintiffs had submitted sufficient evidence of prior cultivation at the origin site located in Willits to qualify to cultivate cannabis at the relocation/ "destination site" located at 1181 Boonville Road in Mendocino County.

The district court adopted the County's counterfeit contention and granted summary judgment relying on the Appellants' failure to adequately rebut the new pretext.

2. The Opt-Out Rezoning Amendment to the Ordinance

The district court granted summary judgment on the class of one "opt-out" rezoning claim asserting (1) plaintiffs did not meet the requirements for a (B)(3) permit and (2) plaintiffs have not submitted any evidence showing how similarly

situated individuals were treated differently without any rational basis for the difference in treatment. (ER 20-22)

Plaintiffs met the requirements for a (B)(3) permit and the reason given by the County on July 9, 2018 to deny the permit was false and pretextual. This is demonstrated by the fact that the County abandoned that reason and offered a new pretext in moving for summary judgment.

The plaintiffs were also damaged by the "opt-out" zoning amendment regardless of whether they had a permit. As set forth in the declaration of plaintiff Ann Marie Borges the fair market value of the eleven acres, zoned agricultural, was approximately $4 million if it was not subject to the opt-out zoning amendment and was reduced to $1 million by virtue of being within the opt-out District. (Borges Decl., ER 222-223). That is simply because someone who had a permit, or who qualified for a permit, could purchase the property and cultivate cannabis but for the opt-out zoning amendment.

The district court also adopted the County's argument that the Appellants failed to prove no other property owner zoned AG/40 was adversely impacted by the amendment to the Ordinance that impacted the Boonville Road/Woodyglen District. (ER 20). The Appellants submitted evidence that they were not aware of any other property owner in the District who was adversely affected. (ER 227-229, Gurr Decl.; ER 277-289, Exhibits 5 and 6). In addition, Supervisor John

McCowen, a moving force behind the amendment, testified he was not aware of any other persons impacted by the amendment. (ER 216; Scott Decl., McCowen deposition, Exhibit 3, p. 161). Drawing inferences in favor of the Appellants as the non-moving parties, the Appellants met their burden of proof.

The Appellants also noted that the County had not identified any other similarly situated resident who was adversely impacted by the rezoning amendment. (ER 108) In response, the district court remarked that "it is not the County's burden to disprove plaintiffs' claim." (ER 20)

The district court also failed to draw inferences in favor of the plaintiffs and granted summary judgment as to the "opt-out" rezoning claim. Here, the plaintiffs live in a small community, as did the plaintiffs in *Willowbrook* and *Gerhart*, and declared that they were treated differently than others similarly situated.

Plaintiffs presented admissible evidence that based on their investigation no other person was adversely impacted by the opt-out ordinance. Plaintiffs corroborated that evidence with Supervisor McCowen's admission that he was unaware of any person other than plaintiffs adversely affected by the opt-out ordinance - of which he was principal architect and proponent. Once plaintiffs presented this evidence showing there was no other person adversely impacted by the ordinance, the burden shifted to the County to produce rebuttal evidence. The County was in a position to identify any person other than plaintiffs adversely

affected by the ordinance, but failed to do so. The County's failure to offer any evidence in rebuttal obviously fails to eliminate the material factual issue of whether any person other than plaintiffs was adversely impacted by the opt-out ordinance.

As the Supreme 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 evidence is available can only lead to the conclusion that the strong evidence would have been adverse. (citations omitted). Silence then becomes evidence of the most convincing character.

This principle is consistent with California Evidence Code section 412 and CACI 203: "If weaker and less satisfactory evidence is offered when it is within the power of the party to produce stronger and more satisfactory, the evidence offered should be viewed with distrust."

CONCLUSION

For the foregoing reasons, this court should find that the Appellants will have the opportunity to rebut the presumption of interstate commerce and the order granting the County of Mendocino's motion to dismiss should be reversed as to the due process claim. In addition, the order granting summary judgment regarding the equal protection claims should be reversed. Finally, this case should be remanded to the district court for further proceedings consistent with the foregoing.

Dated: August 10, 2022

SCOTT LAW FIRM

/s/ John Houston Scott
John Houston Scott
Attorney for Plaintiffs-Appellants

Dated: August 10, 2022

WILLIAM A. COHAN, P.C.

/s/ William A. Cohan
William A. Cohan
Attorney for Plaintiffs-Appellants

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Instructions for this form: http://www.ca9.uscourts.gov/forms/form17instructions.pdf

9th Cir. Case Number(s) 22-15673

The undersigned attorney or self-represented party states the following:

- (●) I am unaware of any related cases currently pending in this court.
- ( ) I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.
- ( ) I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature /s/ John Houston Scott **Date** Aug 10, 2022

*(use "*s/[typed name]*" to sign electronically-filed documents)*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 22-15673

I am the attorney or self-represented party.

This brief contains 8,762 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- (•) complies with the word limit of Cir. R. 32-1.
- ( ) is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ( ) is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ( ) is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ( ) complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ( ) it is a joint brief submitted by separately represented parties;
  - ( ) a party or parties are filing a single brief in response to multiple briefs; or
  - ( ) a party or parties are filing a single brief in response to a longer joint brief.
- ( ) complies with the length limit designated by court order dated _____.
- ( ) is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ John Houston Scott **Date** Aug 10, 2022

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants hereby request oral argument.

Respectfully submitted,

SCOTT LAW FIRM

Dated: August 10, 2022

By: /s/ John Houston Scott
John Houston Scott
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed Opening Brief of Plaintiffs-Appellants and attached current Service List with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 10, 2022.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: /s/ Sherry Alhawwash
Sherry Alhawwash

SERVICE LIST

Attorneys for Plaintiffs-Appellants, ANN MARIE BORGES and CHRIS GURR:

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

William A. Cohan
WILLIAM A. COHAN, P.C.
2888 Loker Avenue E, Suite 202
Carlsbad, CA 92010
Telephone: (442) 325-1111
Facsimile: (442) 325-1126
E-mail: bill@williamacohan.com

Attorneys for Defendant-Appellee, COUNTY OF MENDOCINO:

Christian M. Curtis
Brina Anna Blanton
OFFICE OF THE COUNTY COUNSEL
501 Low Gap Road, Room 1030
Ukiah, CA 95482
Telephone: (707) 234-6885
Facsimile: (707) 463-4592
E-mail: curtisc@mendocinocounty.org; blantonb@mendocinocounty.org

Michael G. Colantuono
Pamela K. Graham
Abigail A Mendez
Merete Rietveld
COLANTUONO, HIGHSMITH & WHATLEY, PC
420 Sierra College Drive, Suite 140
Grass Valley, CA 95945
Telephone: (530) 432-7357
Facsimile: (530) 432-7356
E-mail: MColantuono@chwlaw.us; PGraham@chwlaw.us; AMendez@chwlaw.us; MRietveld@chwlaw.us

John Abachi
COLANTUONO, HIGHSMITH & WHATLEY, PC
790 E. Colorado Blvd., Suite 850
Pasadena, CA 91101-2109
Telephone: (213) 542-5700
Facsimile: (213) 542-5710
E-mail: jabaci@chwlaw.us