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.

REPLY 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

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INTRODUCTION

The County of Mendocino's opposition brief confirms that this appeal raises an important issue of first impression. The County asks this court to ignore the threshold issue raised on appeal, i.e., whether marijuana legally grown, regulated and taxed is subject to a conclusive presumption of interstate commerce. The Plaintiffs are not asking this court to reverse *Gonzales v. Raich*. Rather, they ask the court to apply well-established precedent and recognize that the presumption of interstate commerce is now rebuttable.

a. Limiting *Gonzales v. Raich* to Constitutional Boundaries

When *Gonzales v. Raich* was decided in 2005, marijuana legally grown in California for medicinal purposes was not licensed, regulated and taxed. In addition, at that time marijuana was legal in only nine states. Proposition 64 was passed by California voters in 2016 and went into effect in 2017. It created a statewide system that allowed qualified persons to become licensed to grow marijuana subject to strict regulations and taxation. Today California is one of thirty-eight states where marijuana has become legalized. The Plaintiffs do not dispute that marijuana illegally grown today is conclusively presumed to be part of interstate commerce.

The County of Mendocino asks this court to ignore the interstate commerce issue as did the district court. "Plaintiffs argue the legalization of cannabis in many

states over the past two decades undermines *Gonzales*. But, cannabis remains illegal under federal law and, if *Gonzales* has lost force, it is for the Supreme Court to say so." (County's Brief, page 9 of 59)

The Plaintiffs do not contend that *Gonzales* has lost its force. Its force should be narrowed according to its *ratio decidendi* and applied according to the tectonic shift in governing law of 38 states legalizing marijuana based on intrastate commerce. The issue is not whether interstate commerce in marijuana is illegal under federal law, which is circumscribed by Article I, Section 8 of the Constitution. Rather, the issue is whether the Plaintiffs can rebut the presumption of interstate commerce given the evolution and expansion of strictly intrastate commerce in cannabis.

b. Criminal Cases Cabin the Interstate Commerce Clause

In a variety of situations, a person facing federal criminal charges can contest the presumption of interstate commerce. Due process often requires that a jury decide the issue. Here, the Plaintiffs are not facing criminal charges. Rather, they seek to enforce a property right created by state law in a Section 1983 action against the County of Mendocino alleging violations of due process and equal protection. The district court and the County avoided the issue by relying on authority holding marijuana is *per se* illegal under federal law without considering whether it is still rational to refuse to recognize that the majority of states have

legalized and regulated intrastate commerce in marijuana after the *Gonzales v. Raich* decision. That tautology circumvents the central issue raised in this appeal - whether the presumption of interstate commerce is now rebuttable under existing law and the test applied by the court in *Gonzales v. Raich*.

c. The County's Pretexts and Prevarication

Plaintiffs have identified the County's pretextual explanations for its license revocation and the opt-out zoning amendment to the Cannabis Ordinance. The County asserts absurd interpretations of County Cannabis Ordinance distinguishing between B-1 and B-3 applicants. In addition, there is no evidence to support the County's claim that the opt-out zoning amendment, targeting the Plaintiffs, had any impact on water demand, traffic or the character of the neighborhood.

ARGUMENT

A. Applying the Logic of *Gonzales v. Raich* to this Case Requires that the Presumption of Interstate Commerce Be Deemed Rebuttable

Plaintiffs' Section 1983 claims are based on a violation of their state created property right to grow and sell marijuana subject to state licenses, regulations and taxes. These claims have been nullified based on overbroad application of the Court's 2005 decision in *Gonzales v. Raich* holding that due to the difficulties in determining its origin, all marijuana was conclusively presumed to affect interstate commerce. Thus, the plaintiffs were not permitted to establish a cognizable

property right based on intrastate commerce for purposes of seeking a remedy under Section 1983.

1. Presumptions Pertinent to the Commerce Clause

The Supreme Court has delineated three types of presumptions: (1) permissive, (2) mandatory rebuttable, and (3) mandatory conclusive. *Francis v Franklin*, 471 U.S. 307, 314 (1985); *McLean v. Moran*, 963 F.2d 1306, 1308-1309 (9th Cir. 1992); See also, *United States v. Pillor*, 387 F. Supp. 2d 1053, 1055-1056 (N.D. Cal. 2005) (the Child Support and Recovery Act did not violate the Commerce Clause but the mandatory rebuttable presumption that a person who failed to pay child support had the ability to do so violated due process).

A mandatory conclusive presumption instruction tells the jury that it must presume that the interstate commerce element of the crime has been proven if the government proves certain predicate facts. A conclusive presumption removes the element from the case once the government has proven the predicate facts. A rebuttable presumption requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is not justified. A permissive inference instruction allows, but does not require, a jury to infer a specified conclusion if the government proves certain predicate facts. *United States v. Warren*, 25 F.3d 890, 897 (9th Cir. 1994); *Francis v. Franklin,*471 U.S. 307 (1985).

The Supreme Court has defined the outer limits of Congress's authority under the Commerce Clause setting out three categories of permissible regulation of interstate commerce. Congress can regulate (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, and (3) those activities that substantially affect interstate commerce. The third category concerns the economic nature of the activity to be regulated. *Wickard v. Filburn,* 317 U.S. 111 (1942) (the production and consumption of homegrown wheat); *Perez v. United States,* 402 U.S. 146 (1971) (loan sharking activities).

2. Caselaw Circumscribing the Commerce Clause

There are limits on the Commerce Clause in relation to activities that do not substantially affect interstate commerce. *United States v. Morrison*, 529 U.S. 598 (2000) (Violence Against Women Act did not provide Congress with authority to enact a civil provision because the activity did not substantially affect interstate commerce); *United States v. Lopez*, 514 U.S. 549 (1995) (possession of a gun in a local school zone was not an economic activity that substantially affected interstate commerce). *Jones v. United States,* 529 U.S. 848 (2000) (federal arson statute did not apply to private, non-commercial residence); *Bond v. United States,* 572 U.S. 844 (2014) (statute imposing criminal penalties for possessing and using a chemical weapon did not reach unremarkable local offense).

In *Gonzales v. Raich*, 545 U.S. 1, 18 (2005) the Court held that Congress has the power to regulate purely intrastate cultivation and possession of marijuana for personal use because the Commerce Clause power extends to purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce. Thus, activities that substantially affect interstate commerce extend to individual instances of conduct with only a de minimis effect on interstate commerce so long as the activity regulated is economic or commercial in nature.

In *United States v. Walls*, 784 F.3d 543 (9th Cir. 2015) the defendant was convicted of conspiracy to transport a juvenile female for prostitution and interstate transportation of a child for prostitution and other related crimes in violation of the Trafficking Victims Protection Act. The defendant was a local pimp. The issue raised was whether under the Commerce Clause Congress had the power to regulate local pimping.

On appeal the defendant argued that the district court misstated the law in instructing the jury that "any act that crosses state lines is in interstate commerce" and "an act or transaction that is economic in nature" and "affects the flow of money in the stream of commerce to any degree affects interstate commerce." Id. at 548-549.

The court affirmed the verdict, noting that an instruction violates due process if it creates a mandatory presumption, either conclusive or rebuttable, which shifts from the prosecution the burden of proving beyond a reasonable doubt an essential element of a criminal offense. A jury instruction includes a mandatory presumption if "reasonable jurors are required to find the presumed fact if the State proves certain predicate facts." Id. at 549. The challenged instruction did not create such a presumption. Rather, it merely defined the language affecting interstate commerce. **"It left it for the jury to decide whether Walls committed conduct that has at least a *de minimis* effect on interstate commerce."**

3. Does Exclusively Intrastate Commerce "Affect" Interstate Commerce?

Whether licensed, regulated and taxed marijuana has some de minimis effect on interstate commerce should now be a rebuttable presumption for a jury to decide. The landscape in 2005 -- the difficulty in determining the origin of marijuana -- formed a rational basis for the *Gonzales v. Raich* Court to decide that a mandatory conclusive presumption of interstate commerce existed as to the production of marijuana in California because unregulated and untaxed marijuana grown for medicinal purposes presumably had a de minimis effect on interstate commerce. However, since 2005 the majority of states have legalized, licensed and taxed the production of marijuana.

This case raises an issue of first impression – whether the presumption of interstate commerce should be rebuttable regarding state licensed, regulated and taxed marijuana when marijuana is now legal in 38 states. *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236 (2021) Given the new realities, a mandatory rebuttable presumption should now apply to the issue of interstate commerce.

As applied to this case, a jury should decide if marijuana grown subject to state regulations and taxes has a de minimis effect on interstate commerce. If the answer is no, it follows that the plaintiffs have a state created property right that is enforceable under 42 U.S.C. section 1983 – regardless of marijuana being illegal under federal law.

The County's claim that more intrastate commerce creates more interstate commerce is irrational. If consumers can obtain marijuana via legal intrastate commerce there is necessarily less demand for illegal marijuana via interstate commerce.

The County's refusal to recognize the "irrebuttable presumption" in *Raich* and *Wickard* ignores the rationale of both. Wickard's red winter wheat was part of an indisputably legal national market maintained by interstate commerce. Wickard had no state granted license, nor did he pay state taxes for the right to produce red winter wheat. Now there are 38 intrastate marijuana markets, all of which necessarily reduce interstate commerce because the relatively inelastic demand for

marijuana is satisfied intrastate. Congress has no power to legislate to preclude intrastate commerce and cannot be permitted to violate state sovereignty by ignoring the existence of 38 intrastate markets. There is no longer a rational basis for the conclusive presumption of interstate commerce.

4. The Conundrum in the Lower Courts

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

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

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

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

5. Statutes Are to Be Interpreted to Avoid Absurd Results

Mendocino County's claim that plaintiffs have no property rights in their cannabis license and cannabis they have produced since legalization by the State of California (along with 37 other sovereign states in the United States) and Mendocino County proves too much. If the federal cannabis prohibition law—21 USC §841—applies to California's licensed and taxed agricultural, manufacturing, distribution and sales of cannabis, all of the California state and local officials who participate in these activities are committing federal felonies—violating 18 USC §371 as co-conspirators and 18 USC §2 as aiders and abettors. Furthermore, these

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

same state and county officials are guilty of 18 USC §1956(a)(1)(A)(i) money laundering and racketeering in violation of 18 USC §1962(c) and (d).

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

As explained in *United States v. Alfeche*, 942 F.2d 697, 698-699 (9th Cir. 1991) and reiterated in *United States v. Butler*, 74 F.3d 916, 924 (9th Cir. 1996) there is nothing in 21 U.S.C. §841 or its history to support interpretations of the statute yielding absurd results:

> Like the First Circuit, which rejected the identical argument in *U.S. v. Stoner*, 927 F.2d 45 (1st Cir. 1991), we find nothing in the history or language of 21 U.S.C. §841 to suggest Congress intended the absurd results possible under this construction.
>
> * * *
>
> Defendants offer no indication Congress intended their interpretation of section 841. The interpretation urged by the government, which we adopt, avoids absurd results and is consistent with the language of the statute.

In *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940) the Court stated the fundamental principles of statutory construction from which the Controlled Substances Act is not exempt:

> All statutes must be construed in light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and the legislative purpose.

Neither the District Court nor the County are willing to acknowledge the tectonic shift which requires common sense and Constitutional limitations to interpret the laws.

6. Limitations on the Commerce Clause

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

> Virginia's FOIA law neither 'regulates' nor 'burdens' interstate commerce; rather, it merely provides a service to local citizens that

> would otherwise not be available at all. The 'common thread' among those cases in which the Court has found a dormant Commerce Clause violation is that 'the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation.' (citation omitted).

Gonzales v. Raich, 545 U.S. 1, 18 (2005) found private consumption of cannabis analogous to red winter wheat in *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1940) because ". . . Congress can regulate purely intrastate activity that is not itself 'commercial,' i.e. not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."

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

Fifteen years after the events adjudicated in *Gonzales v. Raich*, California promulgated comprehensive state and local statutes that include licensing and taxation of cannabis production, manufacturing, distribution and sales strictly confined to the State of California. Consequently, the contentions concerning "diversion into illicit channels" have been eliminated by the creation of adequate enforcement resources funded by the billions of dollars in intrastate cannabis commerce itself and the continuing enforceability of 21 U.S.C. §841 against any persons knowingly trafficking in such "illicit diversion(s)."

In holding that California's environmental protection law's higher standards than federal law did not infringe on Congress's power to regulate interstate commerce, the Ninth Circuit explained in *Rocky Mtn. Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013) at 1087:

The Commerce Clause provides that "congress shall have Power . . . to regulate Commerce . . . among the several States." U.S. Const., art. 1 §8, cl. 3. This affirmative grant of power does not explicitly control the several states, but it "has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce. (citations omitted) Known as the "negative" or "dormant" Commerce Clause, this aspect is not a perfect negative, as "the Framers' distrust of economic Balkanization was limited by their federalism favoring a degree of local

autonomy. (citations omitted). Within the federal system a courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." (citation omitted). If successful, those experiments may often be adopted by other states without Balkanizing the national market or by the federal government without infringing on state power.

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

B. The Law Regarding Pretext

To succeed under Equal Protection, Plaintiffs must establish that Mendocino County intentionally treated Plaintiffs differently from similarly situated persons without a rational basis. *Gerhart v. Lake County*, *Mont*., 637 F.3d 1013, 1022 (9th Cir. 2011) (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Where an equal protection claim is based on selective enforcement of valid laws, a plaintiff can show that the proffered rational basis is merely a pretext for an impermissible motive.

Acts that are malicious, irrational, or plainly arbitrary do not have a rational basis. *Engquist v. Oregon Dept. of Agric*., 478 F.3d 985, 993 (9th Cir. 2007). In the Ninth Circuit it is clearly established that the plaintiff may pursue an equal protection claim by creating a triable issue of fact that the defendant's asserted

rational basis is a pretext for differential treatment. *Armendariz v. Penman*, 75 F.3d 1311, 1327 (9th Cir. 1996) (en banc)

Pretext is shown by creating a triable issue of fact that either: (1) the proffered rational basis is objectively false; **or** (2) the defendant actually acted based on an improper motive. *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 946 (9th Cir. 2004). Here we have both.

In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the defendant is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt. Fundamentally different justifications would give rise to a genuine issue of fact with respect to pretext since they suggest the possibility that neither of the official reasons was the true reason. *Washington v. Garrett*, 10 F.3d 1421, 1434 (9th Cir. 1993); *Nidds v. Schindler Elevator*, 103 F.3d 854, 859 (9th Cir. 1996); *Payne v. Norwest Corp*., 113 F.3d 1079, 1080 (9th Cir. 1997).

The value and import of circumstantial evidence in all cases equally applies to discrimination and the issue of pretext. *Desert Palace v. Costa*, 539 U.S. 90 (2003); *Stegall v. Citadel Broadcasting Co*., 350 F.3d 1061, 1066-1067 (9th Cir.

2003). "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." Id.

In the district court the County produced evidence that other B-3 relocation permit applicants identified by the Plaintiffs were not similarly situated because their cultivation on the origin site was not as remote in time as was the Plaintiffs'. It appears this argument, embraced by the district court, has now been abandoned. The Cannabis Ordinance did not specify a time limit of cultivation activities on the origin site.

With no evidence in support of the claim, the County's brief at page 8 asserts for the first time -- directly contradicting Diane Curry's declaration -- that when Agricultural Commissioner Curry issued plaintiffs' provisional permits, they were issued ". . . automatically before staff examined applications." (Curry Decl., 2-ER-130-135) This is additional evidence of pretext regarding the reason now given by the County to deny the permit.

As to the amendment to the Cannabis Ordinance the County has acknowledged that the Plaintiffs were singled out and targeted through a pretextual process whereby their neighbors were allowed to vote to opt-out their neighborhood from cannabis cultivation. It is undisputed that this was the only area in the County zoned agricultural that was so impacted by the opt-out zoning amendment - as declared by Plaintiff Gurr and testified to by Supervisor John

McCowen. (Gurr Decl, 2-ER-229-231; McCowen deposition, 2-ER-218) The County produced evidence about the process claiming it was rational and legitimate. Plaintiffs claim it was pretextual because the process only targeted the Plaintiffs and the reasons given are pretextual: ". . . water demands, traffic, residential character." (County Brief, p. 20) No evidence of any projected changes in water demands, traffic, or residential character was produced -- nor does it exist.

C. Pretexts to Deny the Permit

The County does not address the arguments raised by the Plaintiffs in their opening brief at pages 38-40 of 50. Rather, at pages 17-21 of 59 of the Appellee's Brief the County ignores the clear language of the Ordinance and relies on the County's website FAQ's to support the claim that the origin site "must be the same legal parcel" as the relocation site. This false and pretextual interpretation of the Ordinance was *the* reason given by the County to deny the Plaintiffs' permit in July 2018 well after it was approved by Commissioner Curry in May 2017.

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

The County asked the district court to the take Judicial Notice of the relevant Ordinance, 10A.17.080. The County's argument is based on a gross mischaracterization of the ordinance. The Ordinance provides as follows:

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

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

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

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

* * *

(B) Requirements specific to Phase One Permits

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

* * *

(B)(3) Relocation. Persons able to show proof of prior cultivation pursuant to paragraph(B)(1) above may apply for a Permit not on the site

previously cultivated (the "origin site") but on a different legal parcel (the "destination site"), subject to the following requirements:

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

The oxymoronic insistence of re-defining "relocation" from "origin site" to "destination site" as "meaning" that the "origin site" is the same legal parcel as the "destination site" is to be accepted because the County's interpretation of the Ordinance is entitled to substantial judicial deference in the event that the Court finds any ambiguity in the language of the underlying Ordinance. The district court declined to accept that argument in granting, in part, the County's motion to dismiss. (1-ER-36)

As the Supreme Court recently held in *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1630 (2018) citing Chevron *U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), ". . . deference is not due unless a 'court, employing traditional tools of statutory construction, is left with an unresolved ambiguity. 467 U.S. at 843." No such ambiguity exists nor can it be created by mere semantic pollution. In language applicable to the County memo's attempts to garble simple English words, the Court noted in *TVA v. Hill*, 437 U.S. 153, 174, n.18:

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

In addition to the plain language of the Ordinance, this official reason to deny the permit is also rebutted by the issuance of B-3 relocation permits to the Plaintiffs and more than 100 other applicants (9-ER-2009-2012), the testimony and declaration of Commissioner Curry (2-ER- 130-135) and the request by Assistant County Counsel Kiedrowski that the Plaintiffs submit an "Agreement Not to Resume Cannabis Cultivation" at the "origin site" located at 26500 Reynolds Highway in Willits, California. (2-ER 130-135, Ex. C, 2-ER -176-178)

The County abandons the argument it made in the district court regarding the six relocation B-3 applicants issued provisional permits, identified by the Plaintiffs, who did not "relocate" to the same legal parcel. (10 ER-2035-2037) The distinction made in the district court between those B-3 relocation applicants and the Plaintiffs had to do with the remoteness in time between the permit application and prior cultivation at the origin site. The Ordinance does not include a "continuity" requirement. In this Court the County has apparently abandoned the argument without explaining how or why over 100 other B-3 applicants were

allowed to relocate from a different origin site to a new relocation site. (9-ER-2009-2012) This also supports the Plaintiffs' claim that they are the victims of arbitrary and irrational treatment by the County of Mendocino.

The Plaintiffs originally proved legacy status by showing proof of prior cultivation at a coastal site. When the Ordinance was amended to exclude coastal sites as origin sites the Plaintiffs were allowed to identify a Willits site as an alternative origin site. This was approved by Commissioner Curry and Assistant County Counsel Kiedrowski thus requiring the Plaintiffs to provide an agreement not to cultivate in the future at the Willits "origin" site. (2-ER-130-135; Ex. C, 2-ER-176-178)

None of this evidence is addressed by the County. Rather, the County is asking this court to accept the FAQ's on its website as an amendment to the Ordinance to achieve absurd results. In addition, the County has failed to address or explain the evidence submitted by Plaintiffs demonstrating that the County's defense is pretextual.

At page 15 of 59 the County's brief asserts:

> To ensure that only existing grow sites could receive (B)(1) legacy permits, the County required proof of 'prior cultivation,' i.e., that the applicant had been growing cannabis continuously from before 2016 to the application date.

No such "continuity" requirement exists in the Ordinance, nor is there any ambiguity in the Ordinance permitting this newly-minted requirement in the guise

of "statutory interpretation." Instead, it merely adds to the list of pretexts constituting *ex post facto* rationalizations for expropriating Plaintiffs' property and property rights.

The County's brief continues (at pages 16-18 of 59) its flight of fantasy by proffering additional permit requirements as if they were present in the cited Ordinance provisions but neither "continuity" nor "control" of the "origin site" are mentioned in the Ordinance.

Because the (B)(3) provisions of the Ordinance provide no basis for the County's pretextual "continuity" and "control" over the origin site requirements invented during this litigation, the County relies on "FAQs" on its website as if the FAQs were part of the (B)(3) Ordinance provisions. No authority is provided for the proposition that the Ordinance can be amended or supplemented by a website publication because no such authority exists.

D. Rezoning to Expropriate Plaintiffs' Property Rights

The County addresses the zoning amendment issue at pages 45-47 of 59 of their Brief. Essentially two arguments are made: (1) the Plaintiffs did not raise a triable issue whether similarly situated persons were treated differently than Plaintiffs and (2) the Plaintiffs do not have any evidence the County did not have a rational basis for designating Plaintiffs' district as a cannabis prohibition district.

The Plaintiffs submitted evidence comparable to the plaintiffs in *Village of Willowbrook v. Olech,* 528 U.S. 562 (2000) and *Gerhart v. Lake County, Montana,* 637 F.3d 1013 (9th Cir. 2011) to meet their initial burden of proof. In *Olech* the plaintiff identified others in the community who were required to grant a 15-foot easement to be connected to the municipal water supply compared to the 33-foot easement demanded of the Plaintiff. The Plaintiff was not required to prove she was the only person so impacted. Rather, it was enough to show she was being treated differently than others known to her.

In *Gerhart* the plaintiff identified ten other persons in the community who were allowed to build an approach to the same public road without a permit. He was not required to prove he was the only person in the community so impacted. Rather, he alleged a prima facie case of class of one discrimination shifting the burden to the County to identify others similarly situated who were treated the same as the Plaintiff and/or provide a rational basis for the disparate treatment.

Here, Plaintiff Gurr submitted a declaration that he was the only person with a permit to cultivate cannabis in an agricultural zone in the County adversely impacted by the opt-out zoning amendment to the Cannabis Ordinance. (2-ER-229-231) In addition, the Plaintiffs submitted the deposition testimony of Supervisor John McCowen, a primary advocate for the zoning amendment. He also was not aware of others in the County with permits to cultivate cannabis who were

adversely impacted by the opt-out amendment. (2-ER-218; Ex. C) The Plaintiffs were singled out in the process from the outset. It is unclear why this undisputed evidence does not, at the very least, raise a triable issue of fact.

Drawing inferences in favor of the Plaintiffs the "rational" basis asserted by the County is pretextual. The justification adopted by the district court was the support of residents in the district who asserted "legitimate land use concerns."

The County relies on the lower court's explanation for its pretextual zoning prohibition:

> Plaintiffs do not have any evidence suggesting that the County did not have a rational basis for designating [Plaintiffs'] district as a cannabis prohibition district as opposed to other districts. . . The evidence in the record shows that the County engaged in a lengthy process involving a consultant and considerable input. . . The designation of the [Plaintiffs'] district as a cannabis prohibition district had significant support of the residents in that district. . . The residents who supported the designation of the prohibition zones expressed concerns about water demands, traffic, and the residential character of the neighborhoods -- all legitimate land use concerns. (County's Brief at pp. 26-27 of 59)

The fatal flaws in this *ratio decidendi* are: (1) there is no evidence that plaintiffs' cannabis cultivation on ¼ acre of their 11 acre farm had any impact on water demands; (2) plaintiffs' farm is located on a private dead end road and no evidence was sought, obtained or presented that plaintiffs growing marijuana on that ¼ acre would or did have any impact on traffic; and (3) there was no evidence that plaintiffs growing marijuana on less than 2.5% of their 11 acre farm in an area

zoned agricultural would or did have any impact on the "character of the neighborhood."

No court can find a rational basis for eliminating cannabis cultivation on less than 2.5% of an 11-acre farm in an agricultural zone merely because of the mathematical possibility that water demands, traffic, and/or the character of the neighborhood MIGHT be impacted. Those mere possibilities are present everywhere in the County and cannot provide a rational basis for prohibition in the absence of any evidence of water demand, traffic, or "neighborhood character" being impacted by plaintiffs' ¼ acre marijuana garden. Accordingly, the zoning prohibition lacked a rational basis.

The Plaintiffs made out a prima facie case by demonstrating they were singled out and others in the community were treated better. The Plaintiffs were not required to prove that persons unknown to them may have been treated similarly. Rather, the County had access to that information and could have produced it to show the Plaintiffs were not singled out. By failing to do so it raises the inference that the County is unaware of others similarly situated who were treated as the Plaintiffs.

E. The Plaintiffs Sufficiently Alleged a Substantive Due Process Claim

The County's reliance on *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 757 (2005) is misplaced. *Castle Rock* involved a Section 1983 action based

on the refusal by law enforcement officers to enforce a domestic abuse restraining order. The Court acknowledged that property rights stem from an independent source such as state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Paul v. Davis*, 424 U.S. 693, 709 (1976). Whereas federal constitutional law determines whether the interest rises to the level of a legitimate claim, the analysis begins with a determination of what the state law is. In *Castle Rock* the Court found that deference to state law was inappropriate under the unique facts of that case regarding the language in a restraining order.

Here, the Plaintiffs were initially issued (not denied) a provisional permit to cultivate cannabis. Commissioner Curry has declared and testified that the Plaintiffs met all of the qualifications for a provisional permit. Assistant County Counsel Kiedrowski was involved in the process and did not interfere with the provisional permit being issued. Over a year later a new Commissioner denied the issuance of a final permit for pretextual reasons that are contradicted by the plain language of the Cannabis Ordinance.

Notably, the plaintiff in *Groten v. California*, 251 F.3d 844, 850 (9th Cir. 2001) was denied the opportunity to apply for a temporary appraiser's permit and the court found an underlying property right had been deprived for arbitrary and capricious reasons. Similarly, in *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988) a builder had a property interest in a building permit that had been denied.

The County then goes on to rely on other cannabis cases that assumed *Gonzales v. Raich* applied without addressing the issue presented in this case, i.e., is the presumption of interstate commerce now rebuttable given the tectonic shift in the state law landscape. None of the cases cited by the County address the issue raised by the Plaintiffs in this appeal.

If this court determines that *Gonzales v. Raich* is now rebuttable it follows that the Plaintiffs have a property right to cultivate cannabis if they can rebut the presumption of interstate commerce. To support a substantive due process claim the Plaintiffs must also prove the subsequent denial of the permit was arbitrary and capricious. *Bateson v. Geisse*, supra. The Plaintiffs' due process claim was eliminated on a motion to dismiss based on the lack of a property right. The Plaintiffs seek leave to amend their complaint, if necessary, to proceed with their Fourteenth Amendment due process claim should this court find that the presumption of interstate commerce is now rebuttable.

CONCLUSION

For the foregoing reasons this Court should reverse and remand this case to the district court to permit plaintiffs to establish that their legally grown cannabis has no effect on interstate commerce and the County's reasons for denying their permit and creating a "prohibition district" in an agricultural zone with no evidence

of adverse impact on water demand, traffic or "neighborhood character" were pretextual.

Dated: December 1, 2022

SCOTT LAW FIRM

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

Dated: December 1, 2022

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I hereby certify that I electronically filed Reply 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 December 1, 2022.

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