No. _____

In The Supreme Court of the United States

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

Petitioners,

vs.

COUNTY OF MENDOCINO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

On March 6, 2023, the United States Court of Appeals for the Ninth Circuit filed it's unpublished memorandum affirming the district court order dismissing Plaintiffs'-Appellants' due process claim that the County of Mendocino arbitrarily and capriciously denied their application for a cannabis cultivation permit. The Ninth Circuit held: as no federally protected property interest exists in cultivating marijuana, the district court properly dismissed Plaintiffs' substantive due process claims. While Plaintiffs attempt to "prove the marijuana in question is part of intrastate commerce," we cannot revisit *Gonzales v. Raich*, 545 U.S. 1 (2005), which upheld the CSA as a valid exercise of Congress's Commerce Clause authority as it is in the Supreme Court's "prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). The timely Petition for Rehearing En Banc was denied on April 19, 2023.

State law creates property rights for purposes of 42 U.S.C. §1983 (*Board of Regents v. Roth*, 408 U.S. 564 (1972)) and the State of California created property rights in cannabis, see Cal. Bus & Prof. Code §§26000-26250. Thus, the Ninth Circuit's ruling instanter violates the property rights of the Petitioners and millions of other citizens in the 38 sovereign states which have created cannabis related property rights.

The question presented is whether this court should exercise its sole prerogative to revisit *Gonzales v. Raich*, 545 U.S. 1 (2005) to reverse the irrebuttable

QUESTION PRESENTED – Continued

presumption that all cannabis is part of interstate commerce and replace it with a presumption rebuttable by state licensed property owners. This would vindicate citizens' and states' rights protected by the Fifth, Ninth, Tenth and Fourteenth Amendments and "return that authority to the people and their elected representatives." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- Ann Marie Borges and Chris Gurr
- County of Mendocino

There are no publicly held corporations involved in this proceeding.

RELATED PROCEEDINGS

- *Flatten, et al. v. Bruce Smith, et al*., United States Court of Appeals for the Ninth Circuit, Case No. 22-15741

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The district court in a published decision filed December 13, 2020 dismissed the Petitioners' substantive due process claim on the basis that they lacked a federally protected property interest in marijuana that was regulated, licensed and taxed by the State of California. *Borges v. County of Mendocino*, 506 F. Supp. 3d 989 (N.D. Cal. 2020). This order granting, in part, a motion to dismiss is reproduced in the appendix to this petition. (Pet. App., pages 45-70).

The district court in a published decision filed April 18, 2022 granted summary judgment on the equal protection class-of-one claims on the basis that the Petitioners failed to show that they were singled out and the County had a rational basis for revoking the license previously issued and the rezoning of Petitioners' property. *Borges v. County of Mendocino*, 598 F. Supp. 3d 846 (N.D. Cal. 2022) This order is reproduced in the appendix to this petition. (Pet. App., pages 7-44).

The Ninth Circuit's March 6, 2023 memorandum in *Borges v. County of Mendocino*, No. 22-15673 is reproduced in the appendix to this petition. (Pet. App., pages 1-6).

The Ninth Circuit's April 19, 2023 order denying the Petition for Rehearing En Banc is reproduced in the appendix to this petition. (Pet. App., page 71).

BASIS FOR JURISDICTION IN THIS COURT

This Court has jurisdiction to review the Ninth Circuit's April 19, 2023 en banc order on writ of certiorari under 28 U.S.C. §1254(1). The petition is timely filed within 90 days of entry of the en banc decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Petitioners brought the underlying action under 42 U.S.C. Section 1983 against Respondent County of Mendocino. Petitioners contend that the Ninth Circuit affirmed violations of their state created property rights secured by the United States Constitution's Fifth, Ninth, Tenth and Fourteenth Amendments and the limitations of the Commerce Clause.

> Commerce Clause, U. S. Const., Article I, Section 8, Clause 3: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."
>
> Fifth Amendment, U. S. Const.: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

> himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> Ninth Amendment, U. S. Const.: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
>
> Tenth Amendment, U. S. Const.: The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.
>
> Fourteenth Amendment, U. S. Const.: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law,

suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Background of this Lawsuit: The Emerald Triangle

The Emerald Triangle is a region in Northern California, named as such because it is by orders of magnitude – and has been for more than a half century – the largest cannabis-producing region in the United States. It includes Mendocino, Humboldt, and Trinity Counties comprising more than 10,000 square miles. The 1960's saw an explosion of illegal marijuana production in the Emerald Triangle, accompanied by pervasive bribery of and extortion by much of the local law enforcement establishment, including the Sheriff and District Attorney of Mendocino County. In January of 2019 Oxford University's Economics Department published "Case Study #8 – The Boom and the Busts: Mendocino County's Agricultural Revolution," noting that a population of 90,000 currently benefits from $5 billion in annual marijuana revenue.

Until 1996 cannabis was prohibited in all 50 states by federal law based on the irrebuttable presumption that all marijuana was part of interstate commerce and, consequently, subject to nationwide prohibition authorized by the Commerce Clause. California's 1996 Compassionate Use Act was the first state law authorizing medical marijuana production, but it was struck down by the U.S. Supreme Court in 2005.

In 2016 California voters approved Proposition 64 making the cultivation and sale of recreational marijuana legal subject to compliance with state and local regulations and taxation. Prior to that time California law provided that marijuana could only by cultivated for medicinal purposes subject to a six plant per person limit. In addition, state law provided for collectives and cooperatives to cultivate and sell marijuana to patients or their caregivers on the condition that no person or entity could profit from the sales. *People v. London*, 228 Cal. App. 4th 544, 553-554 (2014).

Over the last two decades thirty-eight (38) states and the District of Columbia have legalized marijuana production notwithstanding federal prohibition. The Ninth Circuit's refusal to recognize Petitioners' rights in the current context of 38 states licensing, regulating and taxing intrastate commerce in marijuana and the concomitant limits of the Commerce Clause violates the Fifth, Ninth, Tenth and Fourteenth Amendments' rights of the citizens and the states. Ironically, this judicially sanctioned prohibition has resulted in perpetuating the bribery of and extortion by state and local law enforcement in the Emerald Triangle.

As a result of the conclusive presumption that all marijuana is part of interstate commerce announced in *Gonzales v. Raich*, persons such as Petitioners who are licensed and taxed to grow marijuana are precluded from seeking a remedy against corrupt state actors under Section 1983 because the federal courts do not recognize an actionable property right in growing and distributing marijuana pursuant to licenses to engage in *intrastate* commerce granted by California (and 37 other states).

The State of California is collecting tens of millions of dollars in tax revenue – instead of hundreds of millions – because the corrupt Emerald Triangle law enforcement establishment continues its partnership with black market marijuana growers at the expense of licensed growers and distributors. The Courts' refusal to recognize state granted property rights to grow and distribute marijuana is a glaring exception to well-established law that property rights are based on state law for purposes of Section 1983 litigation.

B. The Issuance of a Permit to Cultivate Marijuana in May 2017

The facts alleged in the First Amended Complaint are summarized below. In 2014, the Petitioners, 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 information technology services in Atlanta, Georgia.

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.

Petitioners thoroughly reviewed the Mendocino County guidelines for the existing Cannabis Program and reached out to the Department of Agriculture. Petitioners also attended numerous meetings featuring County and State agency representatives. This information helped guide the Petitioners to the eleven (11) acre farm they purchased in August 2016 on a private road in Mendocino County. 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 Petitioners also consulted with three licensed cannabis farmers who visited the site. From a zoning perspective the Petitioners were desirable applicants.

On May 1, 2017 Petitioners completed their application to cultivate cannabis. On May 4, 2017 – while accompanied by an attorney – they met with Mendocino County Agriculture Commissioner Diane Curry

and Christina Pallman of her staff. Petitioners' Mendocino County Ordinance §10A.17.080(B)(3) license application to grow marijuana at their new site was conditionally approved by Commissioner Curry based on the information contained in the application, documents provided, and proof of prior cultivation experience.

Petitioners were given an "Application Receipt" signed by Commissioner Curry dated May 4, 2017. It is a temporary permit. It provides, in pertinent 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 Petitioners 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.

The Petitioners 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 Petitioners were contacted by Commissioner Curry and notified that their permit application was reapproved based on a different origin site. On September 19, 2017 the Plaintiffs went to Commissioner Curry's office to pick up the permit.

The anticipated handoff was interrupted by Deputy County Counsel Matthew Kiedrowski. He informed the Petitioners 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 delaying the issuance of the permit.

Petitioners 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 Petitioners, submitted to Matthew Kiedrowski a signed Agreement Not to Resume Cannabis Cultivation at the prior cultivation site in Willits.

After completing and submitting Cal Cannabis applications, on January 23, 2018 the Petitioners received a Temporary Cannabis Cultivation License from the California Department of Food and Agriculture. This was issued following a close examination and inspection of the Petitioners' real property and water supply by the California Department of Fish and Wildlife, the State Water Resources Control Board, and the State Department of Food and Agriculture.

C. The August 2017 Seizure of Petitioners' Licensed Marijuana Plants and Related RICO Action

On August 10, 2017 at approximately 10:30 a.m., a convoy of CDFW (California Department of Fish & Wildlife) vehicles arrived at Petitioners' property and

agents, with guns drawn, immediately placed the Petitioners in handcuffs. Petitioners informed Lt. 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 cut down 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 acre farm.

During the August 10, 2017 search and seizures CDFW agent Mason Hemphill, under the direction and supervision of the notorious Sgt. Bruce Smith of the Mendocino County Sheriff's Office, searched the property and the home of the Petitioners. Agent Hemphill took custody and possession of a 10 pound random marijuana sample, 163 living marijuana plants and 98 living marijuana plants. During discovery Petitioners determined that evidence reflecting the chain of custody and proof of destruction of the Petitioners' marijuana, required by California Health & Safety Code Section 11479, did not exist. According to 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 was stored, transported or destroyed after it was seized.

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. Although the warrant used to justify the search and seizure authorized seizing evidence limited to alleged "illegal water diversion," the law enforcement officers failed to seize any evidence of water diversion during the raid.

On August 9, 2021 the Petitioners along with two other plaintiffs, Ezekial Flatten and William Knight, filed a RICO lawsuit against Bruce Smith and Steve White in the Mendocino County Superior Court. The Defendants removed the case to federal court as related to this action. The district court agreed that the two cases are related.

The RICO action alleged a criminal conspiracy to conduct the affairs of an enterprise through a pattern of perpetrating RICO predicate crimes, i.e., racketeering activity. The association-in-fact enterprise is the Mendocino County Sheriff's Office and District Attorney's Office. The pattern is established by Defendants Smith and White's admissions of committing hundreds of marijuana seizures with no proof that the seized marijuana was destroyed.

The RICO claims are not based on legitimate law enforcement activities. Rather, the RICO claims are based on the allegation that Defendants Smith and White participated as co-conspirators by committing acts of extortion, in violation of Section 1951(b)(2), by seizing and selling tons of marijuana while claiming it

was destroyed. The RICO claims are grounded on the allegation that the marijuana confiscated by Smith and White was not destroyed, rather, it was extorted and sold.

The district court granted the Defendants' motion to dismiss. It is now on appeal to the Ninth Circuit, No. 22-15741, and is under submission. The Petitioners anticipate it will also be the subject of a Petition for Certiorari to this court given the recent Ninth Circuit decision in *Shulman v. Kaplan*, 58 F.4th 404 (9th Cir. 2023) holding that even though marijuana is property pursuant to state law, it is ineligible for protection under the RICO statute because "it's like heroin" and the Controlled Substances Act was passed during the same session of Congress that passed the RICO statute. This coincidental chronology is offered as authority for creating this "separate but equal property" distinction. The opinion never mentions the Fifth, Ninth, Tenth and Fourteenth Amendments, the Commerce Clause, nor the fact that 38 states have created property interests in marijuana – but none have legalized, licensed or taxed heroin.

D. The July 2018 Revocation 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 Commissioner of the Department of Agriculture. On July 9, 2018 the County of Mendocino, Department of Agriculture mailed a letter to the

Petitioners 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. The permit was approved by Commissioner Curry. This was a revocation of the permit disguised as a denial.

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

E. The December 2018 Amendment to the Cannabis Ordinance Arbitrarily Singling out the Petitioners for Rezoning

Beginning on or about November 2017 the Petitioners' neighbors colluded with 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 Petitioners 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 Petitioner Chris Gurr from participating in the process as well as other residents who were not opposed to Petitioners' cultivation of cannabis.

The "opt-out" amendment was approved by the Mendocino County Board of Supervisors in December 2018. The "opt-out" amendment targeted only two neighborhoods in the entire County. Of the two, the Petitioners' property was located in the Boonville/Woodyglen CP District, an area zoned agricultural. This unprecedented political expedient purportedly gave a right to Petitioners' neighbors to decide whether to "opt-out" of the zoning plan and thus prevent Petitioners from exercising their right to cultivate cannabis on their property.

WHY CERTIORARI IS WARRANTED

I. Certiorari is Warranted Because the Seismic Shift in State Marijuana Laws, the Limitation on the Commerce Clause, and Respect for Federalism Require Revisiting *Gonzales v. Raich*

A. This Petition Raises an Exceptionally Important Issue of National Interest

In order to decide whether to grant certiorari in this case, the Court should consider that property

interests were not discussed in *Gonzales v. Raich*, 545 U.S. 1 (2005), nor in *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236 (2021). Consequently, the Fifth, Ninth, Tenth and Fourteenth Amendments' rights of citizens and states were never considered.

The Petitioners are not aware of any Circuit Court that has directly addressed the *exceptionally important* national issue raised in this case – applying the law and reasoning in *Gonzales v. Raich* to today's reality, i.e., marijuana is now licensed, taxed and regulated in California and legal in 38 states. The Commerce Clause and Section 903 of the Controlled Substances Act prohibit the United States from violating the sovereignty of the states unless the activity has a substantial effect on interstate commerce.

Whether persons who are licensed, regulated and taxed by 38 states to grow or distribute marijuana should be allowed to pursue a remedy under Section 1983 for the deprivation of a state created property right by making the conclusive presumption of interstate commerce rebuttable.

This issue is of exceptional importance because it: (1) directly affects the citizens of 38 sovereign states including many thousands of persons licensed to cultivate or distribute marijuana; (2) adversely impacts the payment of billions of dollars in both state and federal tax revenues; and (3) prevents law abiding citizens from accessing federal courts to both remedy and deter government corruption and related Constitutional violations by state actors. The reality is that unchecked

police power has provided and continues to provide the opportunity, and money provides the motive, for corrupt state officials and law enforcement officers to deprive licensed persons of their state created property rights.

The Ninth Circuit's decision in this case conflicts with the rationale of *Gonzales v. Raich*, 545 U.S. 1 (2005), while claiming to rely upon it. 21 U.S.C. Section 903 and *Gonzales* logically limit the orbit of the Controlled Substances Act ("CSA") to the factual and legal landscape that existed in 2005, i.e., the difficulties in determining the origin of the cannabis in question circa 2005, which difficulties disappear in 2023 when those difficulties are shifted to the licensees to prove their possession is licensed. The "gaping hole" in the CSA relied upon by the *Gonzales* court, 545 U.S. at 22, caused by a lack of comprehensive intrastate regulation and enforcement of marijuana cultivation and distribution, no longer exists in California and 37 other states. The earlier lack of intrastate regulation and enforcement supported the conclusion in 2005 that "determining the origin" of the marijuana in question would be too great a burden on federal law enforcement. Henceforth, persons should be permitted to demonstrate that the marijuana in question is within the legal limitations of their license granted by one of the 38 states currently licensing, regulating and taxing marijuana.

Constitutional limitations on federal jurisdiction are at the core of federalism. Application of the Constitutional limitations on interstate commerce is required

to limit the Controlled Substances Act to interstate commerce and respect the sovereignty of the states. The Petitioners ask this court to revisit the conclusive presumption announced in *Gonzales v. Raich*.

None of the cases relied upon by the district court or the Ninth Circuit to deny Petitioners' property rights mention or discuss the conclusive presumption of interstate commerce, 21 U.S.C. Section 903 of the Controlled Substances Act, state sovereignty or the fact that state licensed doctors regularly prescribe opioids listed in the CSA.

Section 903 of the CSA provides that: "No provision of this subchapter shall be construed as indicating an intent on the part of 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."

Here, the district court did an analysis of recent district court decisions and noted that plaintiffs "do not cite any on-point authority holding that they can assert a property interest. . . ." "The court recognizes that the state regulatory landscape has changed since *Gonzales*. Nevertheless, marijuana cultivation remains illegal under federal law. As such, the Court agrees with the reasoning of other courts that have addressed this question and concludes that plaintiffs

do not have federally protected property interest in cultivating medical marijuana and thus they cannot state a claim under Section 1983 for violation of their due process rights." (Pet. App., at pages 60-61).

The Ninth Circuit affirmed. It observed that "while Plaintiffs attempt to 'prove the marijuana in question is part of intrastate commerce,' we cannot revisit *Gonzales v. Raich*, 545 U.S. 1 (2005), which upheld the CSA as a valid exercise of Congress's Commerce Clause authority." The court went on to hold that "Plaintiffs argue that we should reconsider *Raich's* holding because more states have legalized marijuana in some form. But the widespread of availability of marijuana strengthens *Raich's* analogy of the national market . . . because a greater supply of marijuana now exists in the national market as a result of state legislation. Regardless, as it is the Supreme court's 'prerogative alone to overrule one of its precedents,' it is not for us to overturn *Raich* or rewrite the CSA to recognize a federally protected property right in marijuana cultivation. *United States v. McCalla*, 545 F.3d 750, 753 (9th Cir. 2008) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)." (Pet. App., at pages 2-3).

B. The Decision in *Gonzales v. Raich* has Been Significantly Undermined

In *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236 (2021) Justice Thomas presented the question whether the holding in *Gonzales v. Raich*, 545 U.S. 1 (2005) can still be justified because 36 states (now 38

states) have legalized intrastate marijuana use: "This contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary." *Ibid.* Because of its trenchant, concise summary of reasons to revisit *Gonzales v. Raich*, it is quoted and paraphrased nearly verbatim below.

Sixteen years ago, this Court held that Congress's power to regulate interstate commerce authorized it "to prohibit the local cultivation and use of marijuana." *Gonzales v. Raich*, 545 U.S. 1, 5 (2005). The reason, the Court explained, was that Congress had "enacted comprehensive legislation to regulate the interstate market in a fungible commodity" and that "exemptions[s]" for local use could undermine this "comprehensive" regime. *Id.*, at 22-29. The Court stressed that Congress had decided "to prohibit *entirely* the possession or use of [marijuana]" and had "designate[d] marijuana as contraband for any purpose . . . prohibiting any interstate use was thus, according to the Court, necessary and proper to avoid a gaping hole in Congress closed regulatory system." *Id.*, at 13, 22 (citing U.S. Const., Art. I, §8).

Whatever the merits of *Raich* when it was decided, federal policies of the past 18 years have greatly undermined its reasoning. Once comprehensive, the Federal Government's current approach is a half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana.

Standing Akimbo provides a prime example. Standing Akimbo, LLC operated a medical marijuana

dispensary in Colorado pursuant to state law permits. And, though federal law still flatly forbids the interstate possession, cultivation, or distribution of marijuana, Controlled Substances Act, 84 Stat. 1242, 1247, 1260, 1264, 21 U.S.C. §§802(22), 812(c), 841(a), 844(a), the Government, post-*Raich*, has sent mixed signals on its views. In 2009 and 2013, the Department of Justice issued memorandums outlining a policy against intruding on state legalization schemes or prosecuting certain individuals who comply with state law. In 2009, Congress enabled Washington D.C.'s government to decriminalize medical marijuana under local ordinance. Moreover, in every fiscal year since 2015, Congress has prohibited the Department of Justice from spending funds to prevent states' "implementation of their own medical marijuana laws." *United States v. McIntosh* 833 F.3d 1162, 1168, 1175-1177 (9th Cir. 2016) (interpreting the rider to prevent expenditures on the prosecution of individuals who comply with state law). That policy has broad ramifications given that, as of 2021, 36 states allowed medicinal marijuana use and 18 of those states also allow recreational use. As of 2023, the number of states has increased legalization for medicinal use from 36 to 38 and for recreational use from 18 to 23.

Gonzales v. Raich, noted 545 U.S. 1, 23-24: Congress classified marijuana as a Schedule I drug. 21 U.S.C. §812(c). This preliminary classification was based, in part, on the recommendation of the Assistant Secretary of HEW "that marijuana be retained within Schedule I at least until the completion of certain

studies now underway." As conceded in a footnote, the test results have been ignored for the last 50 years. Given all these developments, one can certainly understand why an ordinary person might think that the Federal Government has retreated from its once-absolute ban on marijuana and may think that intrastate marijuana operations will be treated like any other enterprise that is legal under state law.

Yet, as Standing Akimbo, LLC and Petitioners here discovered, legality under state law and the absence of federal criminal enforcement do not ensure equal treatment. At issue in *Standing Akimbo* is a provision of the Tax Code that allows most businesses to calculate their taxable income by subtracting from their gross revenue the cost of goods sold *and* other ordinary and necessary business expenses, such as rent and employee salaries. *See*, 26 U.S.C. §162(a); 26 C.F.R. 1.61-3(a) (2020). But because of a policy provision in the Tax Code, companies that deal in controlled substances prohibited by federal law may subtract only the cost of goods sold, not the other ordinary and necessary expenses. *See*, 26 U.S.C. §280E. Under this rule, a business that is still in the red after it pays its workers and keeps the lights on might nonetheless owe substantial federal income tax.

Standing Akimbo, LLC and Petitioners instanter have found that the Government's willingness to often look the other way on marijuana is more episodic than coherent. This disjuncture between the Government's recent *laissez-faire* policies on marijuana and the actual operation of specific laws is not limited to the tax

context. Many marijuana-related businesses operate entirely in cash because federal law prohibits certain financial institutions from knowingly accepting deposits from or providing other bank services to businesses that violate federal law. Cash-based operations are understandably enticing to burglars and robbers. But, if marijuana businesses, in recognition of this, hire armed guards for protection, the owners and the guards might run afoul of a federal law that imposes harsh penalties for using a firearm in furtherance of a "drug trafficking crime." 18 U.S.C. §924(c)(1)(A). A marijuana user similarly can find himself a federal felon if he just possesses a firearm. §922(g)(3). Or Petitioners and similar businesses may find themselves on the wrong side of a civil suit under the Racketeer Influenced and Corrupt Organizations Act. *See*, *e.g.*, *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 876-877 (10th Cir. 2017) (permitting such a suit to proceed).

The instant case demonstrates that the Emerald Triangle legal establishment has succumbed to the enormous temptations luring other "robbers and burglars" as a result of the confluence of these legal anomalies. The Federal Government's current approach to marijuana bears little resemblance to the watertight nationwide prohibition that a closely divided court found necessary to justify the Government's blanket prohibition in *Raich*. If the Government is now content to allow states to act "as laboratories" "'and try novel social and economic experiments,'" *Raich*, 545 U.S. at 42, 125 S. Ct. 2195 (O'Connor, J., dissenting), then it might no longer have authority to intrude on "the

states' core police powers . . . to define criminal law and to protect the health, safety, and welfare of their citizens." *Ibid.* A prohibition on intrastate use or cultivation of marijuana may no longer be necessary *or* proper to support the government's piecemeal approach.

C. Applying *Stare Decisis* Based on *Dobbs v. Jackson Women's Health Org.* Requires Revisiting *Gonzales v. Raich*

In *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) the Court found that the principle of *stare decisis* did not compel continued acceptance of *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), where *Roe* "usurped power to address a profound, important moral and social question unequivocally left to the people. . . ."

The majority opinion, concurring, and dissenting opinions reflected the profound polarization dividing the justices on the question of abortion, but there was little, if any, disagreement on the criteria for deciding whether *stare decisis* controlled the outcome of the controversy. Both the majority opinion and dissent noted "adherence to precedent is not an 'inexorable command.'" 142 S. Ct. at 2261 and 2334. The majority, concurring, and dissenting opinions agreed that a Constitutional precedent may be overruled only when: (i) the prior decision is not just wrong, but is egregiously wrong; (ii) the prior decision has caused significant negative jurisprudential or real-world

consequences; and (iii) overruling the prior decision would not unduly upset legitimate reliance interests. *See*, *e.g.*, Justice Kavanaugh's concurring opinion, 142 S. Ct. at 2307.

The dissent identified traditional *stare decisis* factors: (1) a change in legal doctrine that undermined or made obsolete the earlier decision; (2) a factual change that had the same effect; or (3) an absence of reliance because the earlier decision was less than a decade old. (*Ibid.* at 2337).

According to the majority in *Dobbs*, the following five factors govern *stare decisis* analysis:

(1) The nature of the Court's error;
(2) The quality of the reasoning;
(3) "Workability";
(4) Effect on other areas of law; and
(5) Reliance interests. 142 S. Ct. at 2265.

The Nature of the Court's Error and Quality of Reasoning

To the degree *Gonzales v. Raich* can be read to prohibit the 50 states from creating their own intrastate commerce in cannabis and implicitly ratifying the Congressional classification of marijuana as a "Schedule I" drug comparable to heroin, the Court's error was egregiously wrong, lacking any rational basis, violating the states' sovereignty, obliterating the limitation of the Commerce Clause and the Ninth and Tenth Amendments, and exalting law enforcement priorities and prejudice above scientific facts concerning

addictiveness, psycho-activity and health benefits by conflating marijuana with heroin and other Schedule I drugs. In his dissent from denial of certiorari in *Standing Akimbo, supra*, Justice Thomas ably assembles and describes the several sources of conflict and confusion creating the continuing *interstate* versus i*ntrastate* cannabis conundrum.

Workability and Effect on Other Areas of Law

Thirty-eight (38) states have enacted laws and implemented comprehensive regulations for intrastate commerce in cannabis reflecting the will of the voters and legislators notwithstanding *Gonzales v. Raich*. Limiting *Raich* to the factual and legal landscape existing at the time of the decision is required by the Fifth, Ninth, Tenth and Fourteenth Amendments. Henceforth, licensed and taxed marijuana growers and distributors in 38 states should be permitted to rebut the presumption that their marijuana is part of interstate commerce.

"Workability" of Petitioners' proposal is amply demonstrated by the 38 states that have implemented intrastate commerce in cannabis, which is generating billions of dollars in tax revenue – amounts which will continue to increase as black market interstate trafficking is replaced by licensed, taxed, and labeled marijuana currently available in myriad products at licensed dispensaries throughout most of those 38 states. The 12 states retaining marijuana prohibition and the federal government can concentrate their

strategic and tactical interdiction resources on the tax-evading black marketeers who are violating numerous local, state and federal laws, further protecting legitimate licensees and the tax revenue on which 38 states increasingly rely.

Reliance Interests

Legitimate reliance interests affected by Petitioners' proffered vindication of states' and individual rights will be protected and promoted. The only reliance interests adversely affected are those of black marketeers and corrupt law enforcement officers and officials currently immunized by the courts' reliance on *Raich*.

The current interpretation of *Gonzales v. Raich* continues to violate the independent rights and sovereignty of 38 states, the property rights of the owners of licenses granted by those 38 states and the property created by those citizens pursuant to those states' laws. These violations of the sovereignty and rights of the 38 states continue to immunize corrupt law enforcement and local officials from civil prosecution for their violations of the fundamental Constitutional rights of persons licensed to legally cultivate marijuana. Notably, Section 1983 was uniquely designed to give citizens the opportunity to police the police, and other corrupt state officials, in federal court. *Monroe v. Pape*, 365 U.S. 167 (1961).

In spite of the universal canon of statutory construction that laws are not to be interpreted to reach

absurd results, that is precisely the situation created by the unconstitutional and illogical analysis and holding in this case. *Gonzales v. Raich* does not constitute "precedent" for ignoring the tectonic shift in facts on which it was based. If, as Petitioners contend without any rebuttal, 38 states have implemented comprehensive regulation of intrastate commerce in cannabis, it is no longer rational to rely on the lack of regulation of intrastate commerce in cannabis as justification for the conclusive presumption that all cannabis is part of interstate commerce. *Wickard v. Filburn*, 317 U.S. 111 (1942) has little precedential value because it did not involve purely intrastate licensed commerce; rather, there was no state issued license to grow red winter wheat – which was indisputably part of a legal national (i.e., interstate commercial) market – and no intrusion on state sovereignty.

D. The Application of the Commerce Clause and Related Presumptions

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). 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

an affected party 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.

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).

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).

E. The Petitioners Adequately Alleged Substantive Due Process Claims

State law creates property rights for purposes of 42 U.S.C. Section 1983. *Board of Regents v. Roth*, 408 U.S. 564 (1972). The State of California created property rights in marijuana as a result of voters passing Proposition 64 in 2016 legalizing recreational marijuana subject to licenses, regulations and taxation. Cal. Business & Professions Code Sections 26000-26250.

The Petitioners alleged a substantive due process claim based on a state created property right to (1) maintain a license for which they qualified and (2) not be arbitrarily downzoned in order to legally cultivate marijuana subject to state regulations and taxation. *Conn v. Gabbert*, 526 U.S. 286 (1999) (substantive due process includes a generalized right to choose one's field of private employment subject to reasonable government regulation); *Lingle v. Chevron U.S.A., Inc*., 544 U.S. 528 (2005) (a challenge to a land use regulation may state a substantive due process claim, so long as the regulation serves no legitimate governmental interest); *Galland v. City of Clovis*, 24 Cal.4th 1003 (2001) (land use decisions do not violate substantive due process unless there has been an abuse of government power that serves no legitimate interest).

The Petitioners alleged that the County denied the permit for irrational and arbitrary reasons. It is also alleged that the Petitioners' property rights were infringed through a downzoning amendment that was arbitrary and irrational. In essence, the Petitioners' permit and zoning were both hijacked by bureaucratic sleight of hand.

Notably, the district court did not address the merits of the substantive due process claims. The Ninth Circuit also did not the address the claims. Accordingly, the substantive due process claims should survive if this Court determines the Petitioners are allowed to rebut the presumption of interstate commerce.

The Petitioners also had parallel class-of-one Equal Protection claims that did not require a property right to be actionable. Those claims survived a motion to dismiss but did not survive a motion for summary judgment. The Petitioners do not believe the class-of-one claims rise to the level of exceptional importance and are not raised in this Petition for Certiorari.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that the petition for writ of certiorari should be granted.

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Respectfully submitted,

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