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**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| ANN MARIE BORGES, DBA Goose Head Valley Farms; CHRIS GURR, DBA Goose Head Valley Farms,<br>Plaintiffs-Appellants,<br>v.<br>COUNTY OF MENDOCINO; et al.,<br>Defendants-Appellees. | No. 22-15673<br>D.C. No. 3:20-cv-04537-SI<br>MEMORANDUM*<br>(Filed Mar. 6, 2023) |

Appeal from the United States District Court
for the Northern District of California
Susan Illston, District Judge, Presiding

Argued and Submitted February 16, 2023
San Francisco, California

Before: WARDLAW, NGUYEN, and KOH, Circuit Judges.

Ann Marie Borges and Chris Gurr (collectively "Plaintiffs") appeal a district court order dismissing their due process claim that the County of Mendocino (the "County") arbitrarily and capriciously denied their application for a cannabis cultivation permit. Plaintiffs additionally appeal the district court's order

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

granting summary judgment to the County on their equal protection class-of-one claims that the County unfairly singled them out in denying that cannabis cultivation permit and then rezoning their neighborhood as a "cannabis prohibition district." We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. As no federally protected property interest exists in cultivating marijuana, the district court properly dismissed Plaintiffs' substantive due process claims. The Controlled Substances Act ("CSA") states that "no property right shall exist" in marijuana as a Schedule I drug with "no currently accepted medical use in treatment in the United States." *See* 21 U.S.C. §§ 881(a)(1), 812(b)(1)(B). And, 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. In *Raich*, the Supreme Court pointed to *Wickard v. Filburn*, 317 U.S. 111 (1942), and held that even medical marijuana homegrown for personal use affected interstate commerce because even a small amount of cannabis could have a "significant impact on both the supply and demand sides of the market for marijuana." *Raich*, 545 U.S. at 30.

Plaintiffs argue that we should reconsider *Raich*'s holding because more states have legalized marijuana in some form. But the widespread availability of marijuana strengthens *Raich*'s analogy of the national, albeit illegal, marijuana market to the wheat market in *Wickard*, because a greater supply of marijuana now

exists in that national market as a result of state legalization. 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)); *see also United States v. Langley*, 17 F.4th 1273, 1275 (9th Cir. 2021) (per curiam) (finding that the Ninth Circuit remains bound by its prior determination that "federal law does not recognize a substantive due process right to use medical marijuana" notwithstanding subsequent widespread state legalization of medical marijuana), *cert. denied*, 142 S. Ct. 1398 (2022).

2. The district court did not err in granting summary judgment to the County on Plaintiffs' claims that the denial of their cannabis cultivation permit violated equal protection. To prevail on their class-of-one claims, Plaintiffs must show that they have been "[1] intentionally [2] treated differently from others similarly situated and that [3] there is no rational basis for the difference in treatment." *SmileDirectClub, LLC v. Tippins*, 31 F.4th 1110, 1122–23 (9th Cir. 2022) (alterations in original) (quoting *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam)).

In 2017, the County enacted the Medical Cannabis Cultivation Ordinance ("MCCO") No. 4381, setting out a phased permitting process intended to allow legacy growers to enter the newly legal state market first. Plaintiffs applied for a Phase One permit for existing

growers. In order to obtain a Phase One permit, the County required Plaintiffs to provide "proof of cultivation at a cultivation site prior to January 1, 2016." MCCO § 10A.17.080(A)(1). The MCCO provides a carveout for legacy growers who had been cultivating cannabis on a different site, but have since relocated, and requires those applicants to provide "[p]hotographs of any cultivation activities that *currently* exist on the legal parcel" that is the origin site. *Id.* § 10A.17.080(B)(1)(b) (emphasis added).

Plaintiffs did not provide evidence that they were *currently* cultivating cannabis on any site on January 1, 2016, instead providing evidence of a coastal location where they had cultivated cannabis in 2009 and a location in Willits, California, where they had cultivated cannabis in the 1980s. It is undisputed that Plaintiffs were not cultivating cannabis on any site on January 1, 2016. The MCCO requires Phase One permits to be issued to applicants who were *currently* cultivating cannabis on January 1, 2016.[1]

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[1] While we hold that the Phase One current cultivation requirement is clear from the face of the MCCO, our understanding is bolstered by the "Frequently Asked Questions" that were posted on the County's website during the period that Plaintiffs applied for the permit, which provide:

> When establishing "proof of prior cultivation" the cultivation activities before and after 1/1/16 must be the same legal parcel (See MCC[O] §10A.17.080(B)(1)(a) & (b)). This legal parcel will become the origin site for purposes of relocation. Only after establishing prior cultivation on the origin site can a cultivator proceed

Thus, in order to establish an equal protection violation, Plaintiffs must present evidence that other "similarly situated" Phase One applicants who did not meet the MCCO relocation requirements received Phase One permits. And Plaintiffs failed to identify any comparators who are "similarly situated" to them "in all material respects." *SmileDirectClub*, 31 F.4th at 1123. Five out of six comparator Phase One applicants presented by the Plaintiffs were currently cultivating marijuana at an origin site on January 1, 2016, and the County had "no documentation" that the sixth comparator applicant had ever actually applied for a relocation permit. Plaintiffs have not identified an applicant who was granted a Phase One permit and were not cultivating at an origin site *on* January 1, 2016. Thus, Plaintiffs fail to establish a triable issue of fact on their equal protection claims for the denial of a Phase One permit.

3. The district court likewise did not err in granting summary judgment on Plaintiffs' claims that the rezoning of their neighborhood as a "cannabis prohibition district" violated equal protection. As with their permitting claims, Plaintiffs fail to present evidence of "similarly situated" cannabis cultivators who were treated differently in the opt-out zoning process. Indeed, the County's rezoning ordinance did not

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with the relocation process for a permit on a destination site under MCC[O] §10A.17.080(B)(3).

The FAQs make plain that the origin site must be cultivated "before and after 1/1/16," and Plaintiffs did not present evidence of a qualifying origin site for purposes of the relocation requirements.

explicitly target the Plaintiffs alone, as another neighborhood, Deerwood, was also deemed a cannabis prohibition district. Mendocino County, Cal., Ordinance § 20.119.070(A).

Moreover, Plaintiffs fail to establish a triable issue of fact on the question of whether the rezoning of their neighborhood had a rational basis. "Federal judicial interference with a local government zoning decision is proper only where the government body could have no legitimate reason for its decision." *Dodd v. Hood River County*, 59 F.3d 852, 864 (9th Cir. 1995). Here, the County adopted the cannabis prohibition districts after a year-long community listening process, which included County-funded studies, community surveys, and county-wide meetings. The record shows that there was strong community support for designating the Plaintiffs' district, as well as the Deerwood neighborhood, as an opt-out zone. As we must exercise caution not to "transform[] run-of-the-mill zoning cases into cases of constitutional right," *Olech*, 528 U.S. at 566 (Breyer, J., concurring), the district court properly granted summary judgment to the County on the Plaintiffs' class-of-one equal protection claims concerning the rezoning of their neighborhood.

**AFFIRMED.**

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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| Ann Marie BORGES, et al.,<br>Plaintiffs,<br>v.<br>COUNTY OF MENDOCINO,<br>Defendant. | Case No. 20-cv-04537-SI<br>**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**<br>(Filed Apr. 18, 2022)<br>Re: Dkt. Nos. 97, 111<br>United States District Court, N.D. California. |

On April 8, 2022, the Court heard argument on defendant's motion for summary judgment. For the reasons set forth below, the Court GRANTS the motion. The Court DENIES plaintiffs' administrative motion to reopen the deposition of Diane Curry because the Court finds that plaintiffs have not demonstrated any basis for reopening that deposition.

## BACKGROUND

Plaintiffs Ann Marie Borges and Chris Gurr allege that the County of Mendocino violated their rights under the Equal Protection Clause of Fourteenth Amendment to the United States Constitution when the County denied their application for a permit to cultivate medical cannabis on July 9, 2018, and when the Mendocino County Board of Supervisors adopted an

ordinance zoning their neighborhood to prohibit commercial cannabis cultivation on December 4, 2018. Borges and Gurr assert a "class of one" claim, contending that the County singled them out for reasons unrelated to any legitimate governmental objective, and that they were treated differently than others similarly situated.

## I. Mendocino County's Medical Cannabis Cultivation Ordinance

In April 2017, the County of Mendocino adopted Medical Cannabis Cultivation Ordinance ("MCCO") No. 4381, enacting Chapter[1] 10A.17 of the Mendocino County Code. Def's Request for Judicial Notice, Ex. A (Dkt. No. 99-1).[2] Along with Chapter 10A.17, the Board of Supervisors also adopted complementary zoning regulations. *Id.* at Ex. C at 68[3] (Board of Supervisors Resolution No. 17-402 ¶ 2).

Chapter 10A.17 sets forth three successive phases of regulation. Section 10.A.17.080 provides,

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[1] Some public documents refer to "Chapter" 10.A.17.080 and some refer to "Section." The Court uses both interchangeably when referring to this portion of the ordinance.

[2] Plaintiffs do not object to defendant's request for judicial notice. The Court finds that the public records submitted by defendant at Dkt. No. 99 are the proper subject of judicial notice, and accordingly GRANTS defendant's request for judicial notice.

[3] The page numbers refer to the ECF stamped numbers in the upper right hand corner of the exhibits.

**Section 10A.17.080 – Permit Phases and Requirements Specific to each Phase**

Unless specifically exempted, in addition to compliance with all other requirements of this Chapter, all Permits shall comply with the following requirements:

(A) Permits under the MCCO will be issued in the following three 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, 2017.[4] 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.

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[4] Based upon other documents submitted by the County in its request for judicial notice, it appears that the date for accepting Phase One applications may have been extended to October 4, 2019. *See* Def's Request for Judicial Notice, Ex. D (Cannabis Cultivation Program FAQs, found at https://www.mendocinocounty.org/government/cannabis-cultivation/cannabis-cultivation-faq, printed 1/19/22).

(2) Phase Two: Starting January 1, 2018, the Agricultural Commissioner will begin accepting applications for Type 1A and Type 2A Permits for indoor cultivation in the following zoning districts, subject to compliance with all other applicable conditions of this Chapter and Chapter 20.242: Limited Industrial (I-1), General Industrial (G-2), and Pinoleville Industrial (P-1). Proof of cultivation prior to January 1, 2016, is not required.

(3) Phase Three: Starting January 1, 2020, the Agricultural Commissioner will begin accepting Permit applications from any applicant in conformance with the conditions of this Chapter and Chapter 20.242. Proof of cultivation prior to January 1, 2016, is not required.

(B) Requirements specific to Phase One Permits.

(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 in compliance with the provisions of section 10A.17.040. Evidence shall include:

(a) Photographs of any cultivation activities that existed on the legal parcel prior to January 1, 2016, including: (i) ground level views of the cultivation activities and (ii) aerial views from Google Earth, Bing Maps, Terraserver, or a comparable service showing: both the entire legal parcel and the cultivation site in more detail. The date these images were captured shall be noted.

(b) Photographs of any cultivation activities that currently exist on the legal parcel, including: (i) ground level views of the cultivation activities and (ii) aerial views from Google Earth, Bing Maps, Terraserver, or a comparable service showing: both the entire legal parcel and the cultivation site in more detail. The date these images were captured shall be noted.

(c) At least one additional document demonstrating cultivation on the legal parcel prior to January 1, 2016, which evidence may be used to substitute for evidence pursuant to clause (a). The Agricultural Commissioner shall prepare a list of the types of documentation that will be accepted to meet this requirement, and

may accept other similarly reliable documentary evidence showing that cannabis was cultivated for medical use prior to January 1, 2016.

(d) Proof of prior cultivation shall be assigned to the applicant relative to their prior cultivation site.

(e) Persons who participated in a permit program pursuant to the County's Chapter 9.31 in previous years may present evidence of such participation and payment of all required fees in order to provide proof of prior cultivation.

(2) Zoning Districts; Exceptions. . . .

. . .

(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 three (3) years after the effective date

of the ordinance adopting this Chapter.

(b) The location and operation of the proposed cultivation site on the destination parcel complies with all requirements and development standards that apply to a new cultivation site as of January 1, 2020, pursuant to this Chapter and Chapter 20.242; provided, however:

(i) An existing cultivation site shall not be transferred to a legal parcel located within the Forestland or Timber Production Zone zoning districts.

(ii) An origin site may relocate to a destination site in the Rangeland zoning district, so long as the destination site has an existing cultivation site and no new cultivation sites would be established.

(c) The origin site shall be restored. The application for a Permit on a destination site shall be accompanied by a restoration plan that is consistent with the standard conditions and best management practices listed in the North Coast Regional Water Quality Control Board Order No. 2015-0023, and

which shall include the following:

(i) Remove or repurpose buildings, greenhouses, fences, irrigation equipment, water intakes, pumps, storage tanks and other materials brought to the origin site for the purpose of cannabis cultivation;

(ii) Remove illegal dams, ponds, or other in-stream water storage to restore material stream flows, unless such features will continue in use;

(iii) Remove or compost agricultural wastes;

(iv) Remove trash or other debris;

(v) Revegetate cleared areas with native plans typical of nearby natural areas, including groundcover, shrubs and trees.

(d) Unless the destination site is within the Agricultural zoning district, the application shall include either a water availability analysis pursuant to paragraph (C)(1)(b) below or a will serve letter pursuant to paragraph (C)(1)(c) below.

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

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

(g) There shall be a two (2) acre minimum parcel size for all Type C, Type C-A or Type C-B Permits.

(4) Multiple Permits. . . .

. . .

Def's Request for Judicial Notice, Ex. A (Dkt. No. 99-1).

Phase One was designed to bring existing growers into the legal market before permitting new entrants

into the market. *See id.*; *see also* Def's Request for Judicial Notice, Ex. C at 74 (Draft CEQA Initial Study stating "Phase 1 consists of the review and permitting of eligible operations in existence as of January 1, 2016 and extends from adoption of the ordinance to January 1, 2018.") (Dkt. No. 99-1); *id.* at 91-92 (stating that permits issued for Phase One "may require physical changes to the existing operations to come into compliance with [various] regulations" and that such changes may include "Relocation to another parcel.").

During the relevant time period, Chapter 10.A.17.080 applied "throughout unincorporated areas of Mendocino County . . . , exclusive of areas within the Coastal Zone." *Id.* at 75; *see also* Def's Request for Judicial Notice, Ex. F (County of Mendocino Medical Cannabis Cultivation – Regulation Application Checklist, stating "Applications are only being accepted for cultivation sites within zoning districts of the Inland Zoning Code. Currently applications for cultivation in the Coastal Zone are not being accepted.") (Dkt. No. 99-4).

When the ordinance took effect in April 2017, Diane Curry was the County's Interim Agricultural Commissioner and she was responsible for implementing the ordinance and evaluating permit applications. Curry Decl. ¶¶ 1, 3-4 (Dkt. No. 103-1); Graham Decl., Ex. BB (Curry Depo. at 25, 29) (Dkt. No. 97-2). Curry testified at her deposition that her office established a process under which applicants who filed applications for permits were issued receipts that functioned as "provisional permits," and that those with provisional permits "were in the process of trying to get compliant

[with the necessary requirements]" and "were working toward getting [a] finalized permit." Curry Depo. at 44:21-45:16. Curry's office issued receipts for applications upon the filing of the applications, and receipts were issued for applications that did not meet all the requirements to obtain a final permit. *Id.*

## II. Plaintiffs' Application for a Permit

In August of 2016, plaintiffs Ann Marie Borges and Chris Gurr purchased an eleven-acre property at 1181 Boonville Road, Ukiah, California. Gurr Decl. ¶ 4 (Dkt. No. 103-3).[5] The property was zoned "AG/40," which allowed agricultural use, and Borges and Gurr intended to cultivate medical cannabis on the property. *Id.* ¶¶ 3-4. In 2017 they formed a business called Goose Head Valley Farms for that purpose. *Id.*

In May 2017, plaintiffs applied for a Phase One permit to cultivate medical cannabis on their Ukiah property. Def's Request for Judicial Notice, Ex. E (plaintiffs' application) (Dkt. Nos. 99-2 & 99-3); *see also* Gurr Decl., Ex. 1.[6] On May 4, 2017, Borges and Gurr met with Curry to submit their permit application, and on the same day Curry issued an application receipt which stated, "This receipt, when signed and

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[5] Defendant has raised numerous objections to plaintiffs' declarations and other evidence. The Court OVERRULES these objections unless specifically noted otherwise in this order.

[6] Both parties have submitted copies of what they identify as plaintiffs' permit application. The version submitted by defendant is larger and contains other materials, such as letters from plaintiffs' neighbors objecting to the approval of the application.

embossed, certifies that the Department of Agriculture is in receipt of an application to cultivate cannabis at the above listed address. The garden at this site is considered to be in compliance, or working towards compliance until such time as a permit is issued or denied." Gurr Decl. ¶ 5 & Ex. 2. Plaintiffs state in their declarations that Curry told them that they could begin cultivating cannabis at the Ukiah property, and that they did so. Borges Decl. ¶ 17; Gurr Decl. ¶ 6.

Because the Ukiah property was not cultivated prior to January 2016, Borges and Gurr applied for a (B)(3) relocation permit. *Id.*; Graham Decl., Ex. CC (Borges' and Gurr's Responses to Requests for Admission Nos. 43 & 46 admitting that plaintiffs were not cultivating cannabis at Ukiah property prior to January 1, 2016) (Dkt. No. 97-2). Plaintiffs have admitted that at the time they submitted their application for a Phase One permit, they were not cultivating cannabis at any site in Mendocino County, and that they were trying to establish a new cultivation site. Graham Decl., Ex. CC (Borges' and Gurr's Responses to Requests for Admission Nos. 44 & 47).

Plaintiffs' initial application identified a coastal location at 43825 Crispin Lane, Manchester, California as the proof of prior cultivation, with photos and utility bills from 2009 as supporting evidence. Def's Request for Judicial Notice, Ex. E at 68, 152; Nevedal Decl. ¶ 2 (Dkt. No. 98). After being notified that a coastal location could not qualify as the proof of prior cultivation, Borges and Gurr amended their application to provide proof of prior cultivation based on inland location at

26500 Reynolds Highway in Willits, California, with photos from 1986-1987 as supporting evidence. Def's Request for Judicial Notice, Ex. E at 3, Ex. H; Nevedal Decl. ¶ 2; Graham Decl., Ex. DD (Response to Special Interrogatory 8) (Dkt. No. 97-2). At the time of their application, Borges and Gurr were not currently cultivating cannabis at the Willits location, and they had abandoned any cultivation activities at that property prior to January 1, 2016. Graham Decl., Ex. CC (Borges' and Gurr's Responses to Request for Admission No. 48).[7]

On or about September 16, 2017, Curry notified plaintiffs their amended application had been finally approved. Borges Decl. ¶ 24; Gurr Decl. ¶ 8. In her declaration, Curry states that she was satisfied that the Willits location met the proof of prior cultivation requirement, although she does not explain how she reached that conclusion. Curry Decl. ¶ 8.[8] The County

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[7] Borges states in her declaration that she "cultivated cannabis at several locations in the County beginning in the 1980's and continuing to 2016." Borges Decl. ¶ 7. However, Borges does not identify those locations, nor does she state that she was cultivating cannabis at the Willits location at the time plaintiffs applied for the permit. Further, as noted *supra*, plaintiffs have specifically admitted that they had abandoned cultivation activities at the Willits property prior to January 1, 2016. At the hearing on defendant's motion, plaintiffs' counsel confirmed that at the time plaintiffs applied for the permit, they no longer had possession or control of the Willits property.

[8] Curry also states in her declaration that "[i]t was the intent of the county to let our legacy growers be the first to obtain permits" and she describes (B)(3) applicants as those "who provide proof of cultivation activities prior to January 1, 2016, at an origin site and apply to relocate their cultivation site to a destination

asserts that Curry's determination was erroneous because Borges and Gurr did not qualify as "legacy growers" because they were not currently cultivating cannabis at the "origin" site of prior cultivation, namely the Willits location.

On September 19, 2017, plaintiffs went to Curry's office to pick up the permit, but Deputy County Counsel Matthew Kiedrowski informed them that they needed to provide proof that they would not resume cannabis cultivation at the Willits location. *Id.* Plaintiffs hired a local land use attorney, and on or about October 31, 2017, plaintiffs' attorney submitted to the Deputy County Counsel a proposed "Agreement Not to Resume Cannabis Cultivation" agreement signed by Borges. Def's Request for Judicial Notice, Ex. H (Dkt. No. 99-4).

Kiedrowski states in his declaration,

> 3. Relocation cannabis cultivation permits ("relocation permit") are covered by MCMC section 10A.17.080(B)(3). One of the requirements for a relocation permit is that "Prior to the issuance of the Permit to cultivate cannabis at the destination parcel, the applicant shall provide the Agricultural Commissioner with an agreement, on a form approved by the Agricultural Commissioner and County Counsel, providing that the applicant releases any right to continue or resume cultivation of

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parcel." *Id.* ¶¶ 4-5. Curry does not explain how a (B)(3) applicant who was no longer cultivating cannabis at an origin site could "relocate" cultivation activities to a destination parcel.

cannabis on the origin parcel." (MCMC, § 10A.17.080(B)(3)(e).) As stated in the ordinance, the document containing the release must be approved by both the Agricultural Commissioner and County Counsel.

4. No template or form agreement pursuant to MCMC section 10A.17.080(B)(3)(e) was generated or approved by the County during Interim Agricultural Commissioner Diane Curry's tenure with the County.

5. I was employed as a Deputy County Counsel during 2016 and 2017, when Plaintiffs Ann Marie Borges and Chris Gurr submitted their application and accompanying materials for a permit to cultivate cannabis. At this time, there was an extensive backlog of permit applications. To the best of my recollection, the Borges/Gurr application was the first such permit application seeking relocation brought to me for review. The County's decision on Plaintiffs' application was presented to Plaintiffs more rapidly due to the circumstances surrounding Plaintiffs' application.

6. I recall that Plaintiffs' counsel created their own version of the release to relinquish the right to continue or resume cultivation on an origin parcel, and submitted it for Agricultural Commissioner and County Counsel approval in an effort to expedite review. The County received Plaintiffs' Agreement Not to Resume Cannabis Cultivation in Autumn of 2017. A true and correct copy of this proposed

Agreement as received by my office is attached here as Exhibit A.[9]

7. County Counsel did not sign or approve Plaintiffs' Agreement Not to Resume Cannabis Cultivation because when our office further inquired about Plaintiffs' proof of prior and current cultivation – an essential part of the relocation permit application – it became clear that Plaintiffs were relying on a prior cultivation site that had last been used approximately thirty years before Plaintiffs applied for the relocation permit application. The proof of prior and current cultivation did not meet the obligations of the ordinance nor was there a clear explanation of how the remediation efforts required by the ordinance would be met, particularly considering there was no showing that Plaintiffs had any then-present ownership or control over the origin site.

8. As part of County Counsel's review of Plaintiff's proposed release, I informed Interim Agricultural Commissioner Curry that County Counsel had a role in approving the release form under the ordinance, and that she could not grant a relocation permit until Counsel's approval had been given on the release form, as per our obligations under the ordinance.[10]

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[9] This is the same document that defendant submitted as Exhibit H to the Request for Judicial Notice.

[10] Plaintiffs' administrative motion to reopen the deposition of Diane Curry is based on this statement in Mr. Kiedrowski's

> 9. Without County Counsel's approval on the applicant's release of the right to cultivate on the origin site as per MCMC section 10A.17.080(B)(3)(e), the application could not be approved. Any approval of a relocation permit application without County Counsel's approval on the release of right to cultivate document would be inconsistent with the ordinance. Any representation that the Agricultural Commissioner could approve an application without County Counsel's approval on the release is inconsistent with the ordinance.

Kiedrowski Decl. ¶¶ 3-8 (Dkt. No. 110-5).

In March 2018, Diane Curry left her position as Interim Commissioner of the Department of Agriculture for Mendocino County. In a letter dated July 9, 2018, Curry's successor, Harwinder Grewal, notified plaintiffs that their application to cultivate medical cannabis was being denied "based on non-compliance with Chapter 10A.17's proof of prior cultivation

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declaration. Plaintiffs contend that this statement constitutes a waiver of attorney-client privilege, and thus that they must be permitted to redepose Ms. Curry and ask her questions about Curry's discussions with Kiedrowski regarding the ordinance and permitting process. The Court finds that this statement does not constitute a waiver of the privilege and the information in paragraph 8 is essentially the same information contained in Ms. Curry's declaration at paragraph 9. Further, plaintiffs state that they want to reopen Ms. Curry's deposition because there is a factual dispute about whether the ordinance requires "present control" over the origin site. The Court finds that there is no such factual dispute, and that the interpretation of the ordinance is a legal question that the Court has resolved in this order.

requirement." Def's Request for Judicial Notice, Ex. E at 2. The letter stated,

> Proof of prior cultivation, as provided for by section 10A.17.080, paragraph (B)(1), has two primary elements: evidence of cultivation activities that existed on the legal parcel prior to January 1, 2016, and evidence of cultivation activities that currently exist on the legal parcel. The evidence of prior and current cultivation activities is to be provided for the same legal parcel.
>
> This requirement is further explained on the County's cannabis cultivation website in the Frequently Asked Questions page (https://www.mendocinocounty.org/business/cannabis-permits-and-licenses/cannabis-cultivation.faq). Since July 2017, it has stated that in order to show proof of prior cultivation, a cultivator must show that the current cultivation activities and the cultivation activities prior to January 1, 2016, took place on the same legal parcel. The same Frequently Asked Questions page referenced above clarifies that when establishing proof of prior cultivation, the cultivation activities before and after January 1, 2016, must be the same legal parcel, and that parcel will become the origin site for purposes of relocation.
>
> Proof of prior cultivation provided to the Department of Agriculture for your permit application does not include evidence of cultivation activities on the same legal parcel for both current cultivation and cultivation prior to

> January 1, 2016. Instead, the proof of prior cultivation worksheet on file with the Department refers to a property near Willits and states that photographic evidence from 1986-1987 was reviewed by the Department. However, current cultivation activities are occurring at a property near the Ukiah area located on Boonville Road, and it is the Department's understanding that you have not had cultivation activities at the Willits area property for many years. The proof of prior cultivation evidence provided for your application does not conform to the requirements of paragraph (B)(1) of section 10A.17.080, because the prior and current activities are not occurring on the same parcel.
>
> As a result of the denial of your cultivation permit application, you are prohibited from cultivating cannabis on your parcels in excess of the limitations of paragraph (B) or (C) of section 10.A.17.030 of the Mendocino County Code.[11]

*Id.*

## III. Rezoning of Boonville Road/Woodyglen District

Plaintiffs claim that beginning in November 2017, one of their neighbors, Sue Anzilotti, colluded with their mutual neighbors to influence Mendocino County

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[11] That section of the code permits cultivation of medical cannabis for personal use.

Supervisors John McCowen and Carre Brown to cause the County to rezone plaintiffs' neighborhood to prohibit cannabis cultivation. The record contains copies of letters signed by Anzilotti and other neighbors to Curry, McCowen and Brown (among others) complaining about plaintiffs' cannabis cultivation at the Ukiah location. *See*, *e.g.*, Def's Request for Judicial Notice, Ex. E at 34-41.

In October 2017, the County hired a consultant to "to develop a zoning exemption process (overlay) for cannabis cultivation sites." Def's Request for Judicial Notice, Ex. L at 2 (Agenda Summary for Nov. 18, 2018 Board of Supervisors Meeting) (Dkt. No. 99-5). The County created a Cannabis Overlay Working Group and three Overlay Sub-Groups to provide guidance and input to the consultant, and that process resulted in a proposal to identify "cannabis accommodation" and "cannabis prohibition" districts, as well as proposed amendments to the current regulations to permit such districts. Def's Request for Judicial Notice, Ex. J at 15 (Nov. 16, 2018 Memorandum to Board of Supervisors) (Dkt. No. 99-4).[12] There were two districts

[12] Gurr states that he applied to be on the Cannabis Overlay Working Group and the sub-group for his district, and that he was initially approved to be in both groups and then he was "suddenly removed from the opt-out sub group without any explanation other than a mistake had been made." Gurr Decl. ¶ 25. Gurr has attached to his declaration emails from Cassandra Borgna, Executive Coordinator of the Mendocino County Executive Office, showing that Gurr was initially included in both groups (in an email dated January 12, 2018 at 2:09 p.m.) and that several hours later Borgna sent an email stating that "an error was made choosing the sub-groups" and that "the Opt-Out group has been

in Ukiah that were proposed as cannabis prohibition districts: Boonville Road/Woodyglen and Deerwood. *Id.* Plaintiffs' property is in the Boonville Road/Woodyglen district.

In July 2018, the consultant held meetings in the districts proposed as cannabis accommodation and cannabis prohibition districts, including in Ukiah. *Id.* According to the public documents filed by defendant, the "meeting held in Ukiah to discuss the Deerwood and Boonville Road/Woodglen CP Districts generated strong support from community members for the district" and "no opposition to the proposed districts was voiced" at that meeting. *Id.* The consultant also solicited community input through a website, and "[i]nput on the Deerwood and Boonville Road/Woodyglen CP Combining Districts were consistently in favor of the district. In total, 28 comments were received and all supported establishment of the districts." *Id.* at 15-16. The consultant also conducted an online survey of affected property owners, and of the respondents in in

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changed to four people who will represent the different communities." *Id.* Ex. G. Along with Gurr, two other people were removed from the Opt-Out sub-group. *Id.* The email also stated that Gurr and the others "can certainly submit their comments/recommendations to the consultant. However, given the short time-frame regarding this matter, Carmel [Angelo] has determined that a smaller group is the best approach." *Id.* Gurr was not removed from the Cannabis Overlay Working Group. *Id.* Plaintiffs do not allege a procedural due process claim (or any other claim) with regard to Gurr not being able to participate in the sub-group.

the Boonville Road/Woodyglen district, 92% supported establishing the prohibition district. *Id.* at 16.[13]

On October 18, 2018, the Planning Commission held a meeting and reviewed the proposed ordinance to establish the cannabis accommodation and cannabis prohibition districts. Def's Request for Judicial Notice, Ex. L at 2-3. Following public testimony, the Planning Commission voted 6-0 to recommend that the Board of Supervisors adopt the ordinance. *Id.* at 43.

On November 16, 2018, the Board of Supervisors held a public meeting to discuss the zoning proposal and proposed ordinance. Def's Request for Judicial Notice, Ex. K. As the hearing, the consultant discussed the two proposed cannabis prohibition districts:

> The two districts that are proposed are Booneville Road, Woody Glen, and Deerwood. Here, we see the map of Deerwood. Deerwood sits about two miles from Ukiah, 2-3 miles, and Booneville, Woody Glen, again, two or three miles, but these are neighborhoods that were really developed predominantly in residential uses, and the folks have various concerns that they've expressed including water demands. A number of folks have expressed concerns about limited water supply, traffic, and neighborhoods and commercial character. That's really what drove the concerns in these

[13] The background of the process is described in detail in the November 16, 2018 memorandum from the Department of Planning and Building Services to the Board of Supervisors. *See generally* Def's Request for Judicial Notice, Ex. J.

> neighborhoods. So, those are our two proposed cannabis prohibition districts.

*Id.* at 179. Gurr spoke in opposition to the proposal to zone the Boonville Road/Woodyglen district as a cannabis prohibition district. *Id.* at 197-98.

On December 4, 2018, the Board of Supervisors adopted Ordinance 4420 adding chapters 20.118 and 20.119 to the County Code to establish procedures to create accommodation or prohibition districts with super-majority support of a neighborhood's property owners. Def's Request for Judicial Notice, Ex. M at 12, 15 (MCC §§ 20.118.020(B) & 20.119.020(B)). Ordinance 4420 also established four districts allowing cultivation and two districts in which cannabis cultivation was prohibited. *Id.* at 14, 17 (MCC §§ 20.118.070 & 20.119.070). The two districts designated as cannabis prohibition districts were Boonville Road/Woodyglen and Deerwood. *Id.* at 17 (MCC § 20.119.070(B)).

## LEGAL STANDARD

Summary judgment is proper if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party, however, has no burden to produce evidence showing the absence of a genuine issue of

material fact. *Id.* at 325. Rather, the burden on the moving party may be discharged by pointing out to the district court that there is an absence of evidence to support the nonmoving party's case. *Id.*

Once the moving party has met its burden, the burden shifts to the non-moving party to "designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting then Fed. R. Civ. P. 56(e)). To carry this burden, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

In deciding a summary judgment motion, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.* at 255. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment. . . ." *Id.* However, conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill Publ'g Co., Inc. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). The evidence the parties present must be admissible. Fed. R. Civ. P. 56(c)(4).

## DISCUSSION

### I. Denial of Medical Cannabis Cultivation Permit

Borges and Gurr claim that the County denied their application for a permit to cultivate medical cannabis for irrational, arbitrary and impermissible reasons in violation of the Equal Protection Clause of the Fourteenth Amendment, and that they are the only AG40 applicants who met the necessary requirements under category (B)(3) of the Ordinance and who were denied a permit.

The Equal Protection Clause ensures that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). "The Supreme Court has recognized that 'an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she has been irrationally singled out as a so-called "class of one."'" *Gerhart v. Lake County, Montana*, 637 F.3d 1013, 1021 (9th Cir. 2011) (quoting *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 601 (2008)). To prevail on a class of one claim, plaintiffs must show that "they have been '[1] intentionally [2] treated differently from others similarly situated and that [3] there is no rational basis for the difference in treatment.'" *Smile-DirectClub, LLC v. Tippins*, 29 F.4th 513 (9th Cir. 2022) (quoting *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam)). "[A] class-of-one plaintiff must be similarly situated to the proposed comparator

in all material respects." *SmileDirectClub*, 29 F.4th at ___, 2022 WL 804146, at *8.

The County contends that plaintiffs cannot meet their burden of showing the elements of their class of one claim because plaintiffs have no evidence of similarly situated permit applicants who met the (B)(3) requirements who were treated differently by the County, nor can plaintiffs show that the County lacked a rational basis to deny plaintiffs' application.[14] As an initial matter, the County contends that plaintiffs did not meet the (B)(3) requirements because they did not provide proof of prior and current cultivation at the "origin" site. It is undisputed that plaintiffs did not do so. Instead, plaintiffs initially provided proof of prior cultivation at a non-qualifying coastal location in Manchester, and then later submitted proof of prior cultivation at a location in Willits; it is undisputed that plaintiffs had ceased cultivating cannabis at both locations at the time they applied for the permit. Graham Decl., Ex. CC (Borges' and Gurr's Responses to Requests for Admission Nos. 44 & 47). Further, it is undisputed that plaintiffs were not cultivating cannabis at the Ukiah property prior to January 2016. *Id.* (Borges' and Gurr's Responses to Requests for Admission Nos. 43 & 46 admitting that plaintiffs were not cultivating cannabis at Ukiah property prior to January 1,

[14] The County raises numerous other arguments regarding plaintiffs' permit denial claim, including that plaintiffs do not have a federally protected property interest in a cannabis cultivation permit. The Court finds it unnecessary to address those arguments.

2016). Plaintiffs do not dispute that they were seeking a permit for a new cannabis cultivation site in Ukiah.

Plaintiffs argue that they did not need to satisfy the (B)(1) requirement of current cultivation because they were applying for a (B)(3) permit. This is a misreading of the ordinance. Section 10A.17.080 (B)(3), "Relocation," provides that "[p]ersons *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'). . . ." (emphasis added). Section (B)(1) requires "evidence that [the applicants] were cultivating cannabis on the cultivation site prior to January 1, 2016, . . . [and] Evidence shall include . . . (a) Photographs of any cultivation activities that existed on the legal parcel prior to January 1, 2016 . . . [and] (b) *Photographs of any cultivation activities that currently exist on the legal parcel*. . . ." (emphasis added); *see also* Def's Request for Judicial Notice, Ex. D (Cannabis Cultivation Program FAQs, found at https://www.mendocinocounty.org/government/cannabis-cultivation/cannabis-cultivation-faq, printed 1/19/22, stating *inter alia* that "When establishing 'proof of prior cultivation' the cultivation activities before and after 1/1/16 must be the same legal parcel (See MCC § 10A.17.080(B)(1)(a)&(b)). This legal parcel will become the origin site for purposes of relocation. Only after establishing prior cultivation at the origin site can a cultivator proceed with the location process

for a permit on a destination site under MCC § 10A.17.080(B)(3)).[15]

As such, in order to prevail on their class of one claim with regard to the permit denial, plaintiffs must show that there are other applicants who did not submit evidence of current cultivation at an origin site but who were granted (B)(3) relocation permits. Plaintiffs do not have any such evidence and thus have failed to raise a triable issue of fact on this claim. The record reflects that in discovery plaintiffs initially admitted that they did not have any information about other permit applicants and plaintiffs asked the County to provide this information:

> [Defendant's] SPECIAL INTERROGATORY NO. 2:
>
> Identify any and all Mendocino County cannabis cultivation permit applicants whose permits were granted, who failed to provide proof of prior cultivation on the same site as the current cultivation site during Phase 1, and/or who failed to provide proof of prior cultivation on the same site as the current cultivation site during Phase 1, but still received a permit.
>
> [Borges'] RESPONSE TO SPECIAL INTERROGATORY NO. 2:

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[15] The County represents that these FAQs have remained the same during the relevant time period, and plaintiffs do not dispute that assertion.

> Plaintiff does not have this information, however, that information is readily available to the County. The Plaintiff requests that the County share this information with her.
>
> [Defendant's] SPECIAL INTERROGATORY NO. 3:
>
> Identify all Mendocino County cannabis cultivation permit applicants who did not meet the prior cultivation site condition explained in Mendocino County Code Section 10A. 17.080(B)(1).
>
> [Borges'] RESPONSE TO SPECIAL INTERROGATORY NO. 3:
>
> Plaintiff does not have this information, however, that information is readily available to the County. The Plaintiff requests that the County share this information with her.

Graham Decl., Ex. CC.[16]

After the Court directed plaintiffs to supplement their discovery responses, Dkt. No. 93, plaintiffs provided a revised response identifying six applicants who were allegedly granted relocation permits without proof of current cultivation at an origin site. *Id.* at Ex. EE. However, the evidence regarding these six applicants shows that none of these applicants has been granted a final permit, and that as of March 25, 2022, all six applications were still "under review." *See* Def's

[16] Defendant's motion and reply papers state that plaintiffs did not conduct any discovery on their class of one claim, and plaintiffs' opposition does not challenge that statement.

Request for Judicial Notice, Ex. O-T (six applications), U (list showing status of the six applications); Supp. Nevedal Decl. ¶ 4 (stating "Plaintiffs allege there are six applicants who are similarly situated to Plaintiffs whose applications were not denied. . . . These six applications remain under review, in part due to the County's backlog of applications, and partly due to delays in application review caused by the applicants themselves.") (Dkt. No. 110-6).

More importantly, the evidence shows that none of the six applicants are similarly situated to plaintiffs in all material respects. Kristin Nevedal, the Director of the Cannabis Department for the County, has filed a declaration stating that five of the applicants (Harris, Parks, Dunn, Foltz and McMurray) have provided proof of prior and current cultivation at the origin sites, and for one of the applicants (Phillips), "[t]he County has no documentation of Phillips' Proof of Prior Cultivation Worksheet whereupon he indicated that he intended to apply for relocation. Due to circumstances, Phillips later indicated a need to switch to a relocation permit, but as of the filing of this document, Phillips' application is still under review." Nevedal Decl. ¶¶ 7-13 (Dkt. No. 98).

Thus, plaintiffs have not submitted any evidence showing that the County has granted anyone a (B)(3) permit where the applicant did not satisfy the (B)(1) requirement of proof of prior and current cultivation at the origin site. Plaintiffs' opposition asserts that "the County is unable to identify any other (B)(3) applicant denied a permit for the reasons given to the Plaintiffs."

Opp'n at 9-10. Plaintiffs misunderstand the law on a class of one Equal Protection claim. It is not the County's burden to show that other applicants have been denied (B)(3) permits for failure to provide proof of prior and current cultivation at the origin site.[17] Instead, it is plaintiffs' burden to show that there are similarly situated applicants who were treated differently. "An equal protection claim will not lie by 'conflating all persons not injured into a preferred class receiving better treatment' than the plaintiff." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005) (quoting *Joyce v. Mavromatis*, 783 F.2d 56, 57 (6th Cir. 1986)); *see*, *e.g.*, *Warkentine v. Soria*, 152 F. Supp. 3d 1269, 1294-95 (E.D. Cal. 2016) (granting summary judgment in favor of city on property owners' class-of-one claim because plaintiff property owners had not met burden to show they were similarly situated in all material respects to comparators); *see also Bruner v. Baker*, 506 F.3d 1021, 1029 (10th Cir. 2007) (affirming summary judgment because "Bruner provided no evidence of similarly situated individuals being treated differently"); *see also Cordi-Allen v. Conlon*, 494 F.3d 245, 250-51 (1st Cir. 2007) ("[T]he case law makes clear that the burdens of production and persuasion must be shouldered by the party asserting the equal protection violation. Thus, '[p]laintiffs claiming an equal protection violation must first identify and

[17] Indeed, if the County submitted evidence showing that other applicants have been denied (B)(3) permits because they did not submit proof of prior and current cultivation at the origin site, that would only arguably demonstrate that the County has treated similarly situated individuals in the same manner.

relate specific instances where persons situated similarly in all relevant aspects were treated differently.' "); *cf. Gerhart*, 637 F.3d at 1022 (finding the plaintiff had submitted sufficient evidence to defeat summary judgment because "Gerhart's uncontradicted testimony was that at least ten other property owners on his block have built approaches to Juniper Shores Lane of which the Commissioners are aware, but for which the Commissioners have not required approach permits. This evidence strongly suggests that Gerhart was singled out when he was told to apply for an approach permit.").[18]

Moreover, even if plaintiffs could argue that any of the six individuals discussed in the Nevedal declaration are similarly situated to plaintiffs, plaintiffs do not have any evidence showing that the County did not have a rational basis for any differential treatment. *See id.* at 1023. ("the rational basis prong of a 'class of one' claim turns on whether there is a rational basis

[18] Plaintiffs' opposition also asserts, citing Mr. Gurr's declaration, that "[n]one of the other [six] relocation/(B)(3) applicants had both prior and existing cultivation at the 'origin' site. Rather, they relocated from an origin site, as did the Plaintiffs, to a new site." Opp'n at 10. However, plaintiffs do not have any evidence in support of this assertion, and the Court agrees with defendant's objection to Mr. Gurr's statement as conclusory and lacking foundation. The evidence submitted by the County shows that five of the six applicants have submitted evidence of prior and existing cultivation at the "origin" site and are seeking to relocate to a new site. The sixth individual, Phillips, submitted evidence of prior cultivation as well as remediation at the "origin" site, and it appears at one point indicated he was not applying for a relocation permit and then changed the application.

for the *distinction*, rather than the underlying government action.") (emphasis in original). As discussed *supra*, Phase One was intended to bring existing growers into the legal market before permitting new entrants into the market. It is undisputed that when plaintiffs applied for the (B)(3) relocation permit, they were not currently cultivating cannabis on the Willits "origin" site, had not cultivated cannabis at the Willits location since the 1980s, and they no longer owned or controlled the Willits site and thus could not restore the origin site. The County has a rational basis for treating plaintiffs differently because five of the six applicants have submitted proof of prior and current cultivation at the origin site, whereas plaintiffs did not. The Court's review of Mr. Phillips' application (which, like the others, is still under review), indicates that Mr. Phillips submitted proof of prior cultivation of an origin site from 2013 and proof of remediation of an origin site from 2018, initially indicated he was not applying for relocation permit, that his application was placed on hold for a period of time, and at some point Mr. Phillips indicated that he was applying for a relocation permit. *See generally* Def's Request for Judicial Notice, Ex. S. There is a rational basis for differential treatment because plaintiffs' application did not comply with the (B)(1) proof of prior cultivation requirement, while the Phillips application contains different forms of evidence and is still under review. *See Thornton*, 425 F.3d at 1168 ("Evidence of different treatment of unlike groups does not support an equal protection claim.").

## II. Rezoning of Boonville Road/Woodyglen District

Borges and Gurr also claim that the December 4, 2018 amendment of the ordinance establishing the Boonville Road/Woodyglen district as a cannabis prohibition district specifically targeted them as the only qualified applicants in an agricultural area prohibited from cultivating cannabis based on change in zoning. Defendant contends that this claim fails because plaintiffs do not have any evidence that similarly situated permit applicants were treated differently with regard to zoning or that the County's actions lacked a rational basis.

The Court agrees with the County. As an initial matter and as discussed *supra*, plaintiffs were not qualified applicants because they did not meet the requirements for a (B)(3) permit, thus undercutting one of the premises of their Equal Protection claim. In addition, plaintiffs have not submitted any evidence showing that similarly situated individuals were treated differently, and they have admitted that they have no evidence of other applicants in either prohibition district who were granted a permit. Graham Decl., Ex. DD (Response to Special Interrogatory No. 4) (Dkt. No. 97-2). Plaintiffs do not dispute that the designation of the Booneville Road/Woodyglen and the Deerwood cannabis prohibition districts affected all persons within those districts.

Plaintiffs' opposition asserts that "[t]he County has not identified any other resident of Mendocino

County, similarly situated to the Plaintiffs and zoned AG40, who was adversely impacted by the 'Opt-Out' zone created by the Board of Supervisors in 2018." Opp'n at 10. Again, it is not the County's burden to disprove plaintiffs' claim; it is plaintiffs' burden to come forward with evidence to show that they were singled out and that similarly situated individuals were treated differently without any rational basis for the difference in treatment.

Plaintiffs also refer to two pieces of evidence in support of their claim that they were singled out. First, plaintiffs cite Mr. Gurr's declaration for his statement, "To my knowledge Ann Marie Borges and I were the only qualified persons in an agricultural zone in the County adversely affected by the 'opt-out' amendment to the zoning plan." Gurr Decl. ¶ 14. The County correctly objects that this statement is conclusory and does not prove that similarly situated individuals were treated differently. Further, and at the risk of repetition, the undisputed evidence shows that plaintiffs were not qualified for the (B)(3) permit. Second, plaintiffs cite the deposition testimony of Supervisor John McCowen for the assertion that plaintiffs were the only individuals who were in the permit process and impacted by the opt-out ordinance. However, Mr. McCowen's deposition testimony does not show that individuals similarly situated to plaintiffs were treated differently. The relevant portion of Mr. McCowen's deposition is as follows:

> Q: All right. And to your knowledge, were there people in the permit process who lived

> in the Deerwood District or neighborhood who were impacted by the opt-out ordinance?
>
> A: I don't know.
>
> Q: Would it be fair to say my clients are the only people you are aware of who were impacted – at least publicly came out and were in permit process and were impacted by the opt-out ordinance?
>
> A: Yes. They are the only ones I'm aware of.

*See* Scott Decl., Ex. C at 161. Thus, Mr. McCowen only testified he did not know whether there were permit applicants in the Deerwood district who were impacted by the rezoning, and that plaintiffs were the only people of whom he was aware who "publicly came out and were in permit process and were impacted by the opt-out ordinance."

In addition, plaintiffs do not have any evidence suggesting that the County did not have a rational basis for designating the Booneville Road/Woodyglen district as a cannabis prohibition district as opposed to other districts. "[I]t is well settled that a municipality may divide land into districts and prescribe regulations governing the uses permitted therein, and that zoning ordinances, when reasonable in object and not arbitrary in operation, constitute a justifiable exercise of police power." *Hernandez v. City of Hanford*, 41 Cal. 4th 279, 296 (2007); *see also Pearl Inv. Co. v. San Francisco*, 774 F.2d 1460, 1463 (9th Cir. 1985). ("[L]and-use planning questions touch a sensitive area of social policy into which the federal courts should not lightly

intrude."). The evidence in the record shows that the County engaged in a lengthy process involving a consultant and considerable public input and participation, and that the Planning Commission unanimously recommended, and the Board of Supervisors approved, the adoption of the ordinance and the establishment of four cannabis accommodation districts and two cannabis prohibition districts. The designation of the Booneville Road/Woodyglen district as a cannabis prohibition district had significant support of the residents in that district (as did the designations of the other districts). 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. *See Nelson v. City of Selma*, 881 F.2d 836, 839 (9th Cir. 1989) ("The preservation of the character and integrity of single-family neighborhoods, prevention of undue concentration of population, prevention of traffic congestion and maintenance of property values are all legitimate purposes of planning and zoning. . . . The opposition of neighbors to a development project is also a legitimate factor in legislative decisionmaking."); *cf. City of Riverside v. Inland Empire Patients Health & Wellness Ctr.*, 56 Cal. 4th 729, 753-54 (2013) (recognizing "the broad authority traditionally possessed by local jurisdictions to regulate zoning and land use planning within their borders" and stating that nothing in state law "requires local zoning and licensing laws to accommodate the cooperative or collective cultivation and distribution of medical marijuana"); *Lo v. County of Siskiyou*, No. 2:21-cv-00999-KJM-DMC, ___

F. Supp. 3d ___, 2021 WL 4026527, at *12 (E.D. Cal. Sept. 3, 2021) (finding county ordinance regulating and prohibiting use of groundwater for cannabis cultivation "rationally related to the County's legitimate interest in preserving scarce groundwater resources in a drought.").

## CONCLUSION

For the foregoing reasons, the Court concludes that plaintiffs have failed to raise a triable issue of fact as to their Equal Protection claim, and accordingly GRANTS defendant's motion for summary judgment.

**IT IS SO ORDERED.**

**Dated: April 18, 2022** /s/ Susan Illston
SUSAN ILLSTON
United States
District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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| Ann Marie BORGES, *et al*.,<br>Plaintiffs,<br>v.<br>COUNTY OF MENDOCINO, *et al.*,<br>Defendants. | Case No. 20-cv-04537-SI<br>**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS FIRST AMENDED COMPLAINT**<br>(Filed Dec. 13, 2020)<br>Re: Dkt. Nos. 33, 34 |

Defendants' motions to dismiss the first amended complaint were scheduled for a hearing on December 11, 2020. Pursuant to Civil Local Rule 7-1(b), the Court determined that these matters are appropriate for resolution without oral argument and VACATED the hearing. For the reasons set forth below, the motions are GRANTED IN PART and DENIED IN PART. The first cause of action may proceed; the second cause of action is dismissed with leave to amend; the third and fourth causes of action are dismissed without leave to amend. If plaintiffs wish to amend the second cause of action, they may file an amended complaint no later than **December 23, 2020**.

## BACKGROUND

### I. Factual Background

The following facts are drawn from plaintiffs' First Amended Complaint ("FAC"), which the Court treats as true for the purposes of these motions to dismiss. In August of 2016, plaintiffs Ann Marie Borges and Chris Gurr purchased an eleven-acre farm zoned AG/40 agricultural use in Ukiah, California. FAC ¶¶ 3, 12. Plaintiffs intended to cultivate medical cannabis on their property, and in 2017 plaintiffs formed a business called Goose Head Valley Farms for that purpose. *Id.* ¶¶ 4, 11-12.

In April 2017, the County of Mendocino adopted the Medical Cannabis Cultivation Ordinance, Ordinance No. 4381, Ch. 20.242, which contains the County's cannabis cultivation regulations.[1] In May 2017, plaintiffs applied for a permit under Mendocino County Code ("MCC") 10A.17.080(B)(3), which governs "relocation." That subsection provides, *inter alia*, "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

[1] The Court takes judicial notice of the various versions of the ordinance submitted by defendants. *See* Dkt. No. 34-1. The Court does not take judicial notice of the other materials submitted by defendants as the Court does not rely on those materials in resolving the current motions.

following requirements. . . ."[2] Plaintiffs' application was conditionally approved by then-Interim Commissioner

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[2] Paragraph (B)(1) provides:

> (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 in compliance with the provisions of section 10A.17.040. Evidence shall include:
>
> > (a) Photographs of any cultivation activities that existed on the legal parcel prior to January 1, 2016, including: (i) ground level views of the cultivation activities and (ii) aerial views from Google Earth, Bing Maps, Terraserver, or a comparable service showing: both the entire legal parcel and the cultivation site in more detail. The date these images were captured shall be noted.
> >
> > (b) Photographs of any cultivation activities that currently exist on the legal parcel, including: (i) ground level views of the cultivation activities and (ii) aerial views from Google Earth, Bing Maps, Terraserver, or a comparable service showing: both the entire legal parcel and the cultivation site in more detail. The date these images were captured shall be noted.
> >
> > (c) At least one additional document demonstrating cultivation on the legal parcel prior to January 1, 2016, which evidence may be used to substitute for evidence pursuant to clause (a). The Agricultural Commissioner shall prepare a list of the types of documentation that will be accepted to meet this requirement, and may accept other similarly reliable documentary evidence showing that

of Agriculture Diane Curry, and plaintiffs were given a temporary permit under which they had authorization to begin cultivation activities. FAC ¶¶ 14-15. Plaintiffs began cultivating marijuana on the property. *Id.*

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

Beginning in June 2017, defendant Sue Anzilotti, who is plaintiffs' neighbor, contacted Steve White of the California Department of Fish and Wildlife ("CDFW") on behalf of "concerned homeowners" who lived adjacent to plaintiffs' property. *Id.* ¶ 17. Anzilotti "made false allegations that the water source for

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> cannabis was cultivated for medical use prior to January 1, 2016.
>
> (d) Proof of prior cultivation shall be assigned to the applicant relative to their prior cultivation site.
>
> (e) Persons who participated in a permit program pursuant to the County's Chapter 9.31 in previous years may present evidence of such participation and payment of all required fees in order to provide proof of prior cultivation.

Plaintiffs' approved cultivation site was not approved for use in commercial cultivation operations." *Id.* White "decided to use a false allegation of water diversion as a pretext to obtain a warrant and seize the plaintiffs' property." *Id.*

In July 2017, Commissioner Curry contacted CDFW agents and requested a meeting with them on plaintiffs' property to better understand the requirements relating to creeks located near cannabis farms. *Id.* ¶ 18. Plaintiffs allege that on July 25, 2017, two CDFW agents went to plaintiffs' property without prior notice, and "[w]ithout performing any tests, they concluded it was likely water was being diverted from the creek and sent a letter to Commissioner Curry stating that they suspected water diversion." *Id.*

On or about July 26, 2017, plaintiffs hired Donald G. McEdwards, a hydrologist, to perform an extensive hydrology study at the property. *Id.* ¶ 19.

On August 10, 2017, "a convoy of CDFW vehicles arrived at Plaintiffs' property and agents, with guns pointed, immediately placed the Plaintiffs in handcuffs." *Id.* ¶ 20. Plaintiffs informed Steve White, the CDFW team leader, that they had a permit application receipt from the County and that they were in full compliance with all County regulations. *Id.* They also informed White that they were waiting for the results of the hydrology report. *Id.* "The CDFW team, without any evidence, claimed they believed the water was being diverted from the nearby creek and proceeded to cut down and eradicate marijuana, *i.e.*, 100 plants

growing indoors under a hoop and 171 plants growing outdoors in an approved location of 10,000 square feet." *Id.* During the search, defendant CDFW agent Mason Hemphill searched plaintiffs' home and property and confiscated numerous items, including over 200 living marijuana plants. *Id.* ¶ 21.

Plaintiffs received the results of the water tests on August 13, and those results showed that "the water in the well is distinct from the water in the creek." *Id.* ¶ 28.

On or about August 14, 2017, plaintiff Ann Marie Borges provided Commissioner Curry with proof of "prior cultivation from the town of Willits in Mendocino County, an area not in the coastal zone." *Id.* ¶ 29.[3] On or about September 16, 2017, Commissioner Curry notified plaintiffs their amended application had been finally approved. *Id.* ¶ 30. On September 19, 2017, plaintiffs went to Commissioner Curry's office to pick up the permit, but "[t]he anticipated handoff was prevented by Deputy County Counsel Matthew Kiedrowski . . . [who] informed plaintiffs that they needed to provide additional proof that the site of prior cultivation in Willits was no longer able to resume cannabis cultivation." *Id.* No other reason was given for being denied a permit. *Id.* Plaintiffs hired a local land use attorney, and on or about October 31, 2017, plaintiffs' attorney submitted to the Deputy County Counsel a signed

[3] Plaintiffs initially identified a coastal location as the "origin site" to satisfy the "proof of prior cultivation" requirement of the ordinance. *See* Compl. ¶ 13.

agreement not to resume cannabis cultivation at the Willits site.

Beginning in November 2017, Anzilotti "colluded with her neighbors and conspired with defendants John McCowen, Carre Brown and Georgeanne Croskey to cause the County to create an 'opt-out' zone that would change the County zoning plan. It was intended to target the Plaintiffs and preclude them from cultivating cannabis on their property." *Id.* ¶ 31. 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. *Id.* County officials intentionally excluded plaintiff Chris Gurr from participating in that process. *Id.* "This unprecedented political experiment gave a right to plaintiffs' neighbors to decide whether to 'opt-out' of the zoning plan and thus prevent plaintiffs from exercising their right to cultivate cannabis on their property." *Id.* ¶ 48.

On November 22, 2017, plaintiff Chris Gurr made a formal complaint against Anzilotti to the Enforcement Division of the Fair Political Practices Commission. *Id.* ¶ 32. "The allegations centered on Sue Anzilotti's use of her position as an unsworn administrator with the Sheriff's Office to obtain access to private information, including illegal[ ] background checks, and misuse of her government position to conduct personal business to influence decisions by County officials and employees that would personally benefit her." *Id.*

On January 23, 2018, plaintiffs received a Temporary Cannabis Cultivation License from the California Department of Agriculture. *Id.* ¶ 33. The license was issued "following a close examination and inspection of the Plaintiffs' property and water supply by the CDFW, the State Water Resources Control Board, and the State Department of Food and Agriculture." *Id.*

In March 2018, Diane Curry left her position as Interim Commissioner of the Department of Agriculture for Mendocino County. *Id.* ¶ 34.

On July 9, 2018, the County of Mendocino Department of Agriculture notified plaintiffs 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 Ordinance 10A.17.080 paragraph (B)(1). *Id.* ¶ 35. Plaintiffs allege the permit denial was based on "a false and fraudulent premise" because plaintiffs did not apply for a medical cannabis permit pursuant to paragraph (B)(1) of the County Ordinance, and instead submitted their application pursuant to paragraph (B)(3) of the Ordinance. *Id.* Plaintiffs allege that they met all of the (B)(3) requirements as determined by Commissioner Curry in May and September of 2017. *Id.* Plaintiffs also allege that they 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." *Id.*

On December 4, 2018, the Mendocino County Board of Supervisors passed Ordinance No. 4420, which amended the Mendocino Cannabis Cultivation Ordinance to, *inter alia*, rezone two districts to "CP Commercial Cannabis Prohibition Combining District." *Id.* ¶¶ 48-49 & Ex. H to FAC. Plaintiffs' property is located in one of the rezoned districts, Boonville/Woodyglen. *Id.* "Plaintiffs were the only qualified persons in an agricultural zone in the County adversely affected by the 'opt-out' amendment to the zoning plan." *Id.* ¶ 48. Plaintiffs allege the zoning decision was made for no legitimate reason and based on impermissible motives, and "[o]n information and belief, this was the first time a County in the State of California created an opt-out zone in the zoning plan that prevented a property owner from cultivating cannabis based solely on the vote of the neighbors." *Id.* ¶ 49.

## II. Procedural Background

On July 8, 2020, plaintiffs filed this lawsuit against the County of Mendocino and Anzilotti. The complaint alleged four causes of action pursuant to 42 U.S.C. § 1983, alleging violations of plaintiffs' rights under the Equal Protection and Due Process clauses of the Fourteenth Amendment to the United States Constitution.

Defendants moved to dismiss the complaint, and after a hearing on September 25, 2020, the Court granted the motions to dismiss and granted leave to amend. At the hearing, the Court informed plaintiffs

that (1) the complaint did not sufficiently allege that plaintiffs constituted a "class of one" with regard to the Equal Protection claims, (2) the Court was skeptical plaintiffs could allege a federally cognizable property interest with regard to the Due Process claims, and (3) the conspiracy allegations against Anzilotti were insufficient.

On October 23, 2020, plaintiffs filed the FAC. The FAC added additional allegations regarding the denial of plaintiffs' application and Commissioner Curry's role in implementing the Ordinance, as well the allegations regarding the change in the County's zoning plan that prohibited plaintiffs from cultivating cannabis on their property and Anzilotti's alleged role in the zoning change. *See*, *e.g. id.* at ¶¶ 16, 31, 37, 39-49. The FAC also added new allegations regarding the regulation of marijuana in California and the tension between federal and state law with regard to the classification of marijuana. *See id.* at ¶¶ 22-27. The FAC also names four new individual defendants: John McCowen,[4] Carre Brown, and Georgeanne Croskey, all of whom were and are members of the Board of Supervisors for the County of Mendocino; and Mason Hemphill, the California Department of Fish and Wildlife ("CDFW") employee who participated in the August 10, 2017 search of plaintiffs' property and who seized plaintiffs' marijuana plants and other property.

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[4] The FAC sometimes refers to McCowen as "John McCune." It is unclear if this is a typographical error.

The FAC alleges four causes of action pursuant to 42 U.S.C. § 1983: (1) Class of One/Equal Protection, against the County; (2) Class of One/Equal Protection, Conspiracy between the County and Anzilotti, McCowen, Brown, and Croskey; (3) Substantive Due Process, against the County; and (4) Substantive Due Process, Conspiracy between the County and Anzilotti, McCowen, Brown and Croskey. Plaintiffs seek declaratory and injunctive relief, as well as damages and attorneys' fees.

Now before the Court are motions to dismiss the FAC filed by the County, McCowen, Brown, Croskey, and Anzilotti.[5]

## LEGAL STANDARD

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," and a complaint that fails to do so is subject to dismissal pursuant to Rule 12(b)(6). Fed. R. Civ. P. 8(a)(2). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "facial plausibility" standard requires the plaintiff to allege facts that add up to "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 570.

[5] Hemphill's answer to the FAC is due in January 2021.

"A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 679.

In reviewing a Rule 12(b)(6) motion, courts must accept as true all facts alleged in the complaint and draw all reasonable inferences in favor of the non-moving party. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, courts are not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted).

If a court dismisses a complaint, it must decide whether to grant leave to amend. The Ninth Circuit has repeatedly held that "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (citations and internal quotation marks omitted).

## DISCUSSION

### I. Due Process: Third and Fourth Causes of Action

The FAC alleges that plaintiffs have a property interest in farming their property and that defendants violated their due process rights by arbitrarily and capriciously denying their application for a permit to cultivate medical cannabis and by rezoning the area to prohibit cannabis cultivation at plaintiffs' property. FAC ¶¶ 64-68. Plaintiffs allege that "[b]y 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 California." *Id.* ¶ 22.

In relevant part, the Fourteenth Amendment commands that "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. . . ." U.S. Const. amend. XIV § 1. To succeed on a procedural or substantive due process claim, a plaintiff "must first demonstrate that he was deprived of a constitutionally protected property interest." *Gerhart v. Lake County, Mont.*, 637 F.3d 1013, 1019 (9th Cir. 2011). "Although the underlying substantive interest is created by an independent source such as state law, federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause." *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748,

757 (2005) (internal quotation marks and citation omitted).

Defendants contend that plaintiffs cannot state a claim for violation of their due process rights because although California has decriminalized aspects of marijuana cultivation, those activities remain prohibited under federal law. *See generally Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding Controlled Substances Act and holding Congress' Commerce Clause authority includes the power to prohibit the local cultivation and use of marijuana, even when such local cultivation and use complies with California law). Defendants argue that a local licensing or permitting scheme for cannabis cultivation does not give rise to a property interest protected by the federal Constitution.

Other courts have recognized "the murky interface of California state law permitting the cultivation and sale of marijuana in some circumstances and the United States federal law banning all such activities." *Citizens Against Corruption v. County of Kern*, Case No. 1:19-CV-0106 AWI GSA JLT, ___ F. Supp. 3d ___, 2019 WL 1979921, at *3 (E.D. Cal. May 3, 2019). In *Citizens Against Corruption*, medical marijuana dispensaries filed suit against Kern County challenging a county ordinance that banned marijuana dispensaries and permitted existing dispensaries to continue operation for an additional twelve months. Judge Ishii dismissed the plaintiffs' due process claims on the ground that the plaintiffs did not have a legally protectible property interest in cultivating marijuana:

> [Citing cases] Those precedents illustrate the problems and limitation Plaintiffs face in trying to vindicate rights that depend on California marijuana law in federal court. Here, Plaintiffs face the insurmountable hurdle that federal law does not recognize any protectible liberty or property interest in the cultivation, ownership, or sale of marijuana. Even though "state law creates a property interest, not all state-created rights rise to the level of a constitutionally protected interest." *Brady v. Gebbie*, 859 F.2d 1543, 1548 n.3 (9th Cir. 1988). "The Supreme Court has held that no person can have a legally protected interest in contraband per se . . . under federal law, marijuana is contraband per se, which means no person can have a cognizable legal interest in it." *Schmidt v. Cty. of Nev.*, 2011 WL 2967786, *5, 2011 U.S. Dist. LEXIS 78111, 15-16 (E.D. Cal. July 19, 2011), citing *United States v. Jeffers*, 342 U.S. 48, 53 (1951). . . . As framed, plaintiffs cannot make a due process claim.

*Id.* Numerous other courts have reached similar conclusions. *See e.g. id.* (citing cases); *see also Kent v. County of Yolo*, 411 F. Supp. 3d 1118, 1123 (E.D. Cal. 2019) (dismissing marijuana cultivator's due process claim challenging county's refusal to renew medical cannabis cultivation license because "federal law does not recognize any protectible property interest in the cultivation of cannabis"); *Grandpa Bud, LLC v. Chelan County Wash.*, No. 2:19-CV-51-RMP, ___ F. Supp. 3d. ___, 2020 WL 2736984, at *4 (E.D. Wash. May 26, 2020)

(dismissing cultivator's due process claim because "[e]ven when cannabis production is a legitimate use of one's property at the state level, such use is not recognized as a protectable property interest under the U.S. Constitution"); *Allen v. County of Lake*, Case No. 14-cv-03934-TEH, 2017 WL 363209, at *2-3 (N.D. Cal. Jan. 25, 2017) (citing cases for the proposition that "there is no protected property interest in medical marijuana for purposes of the Fourteenth Amendment").

Plaintiffs do not cite any on-point authority holding that they can assert a property interest in cultivating medical cannabis that is cognizable in a § 1983 action. Instead, plaintiffs contend that California has created a state property interest by licensing and taxing production, distribution and sales of cannabis, and that the "fact, law and logic [of *Gonzales v. Raich*] 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." Pls' Opp'n at 18 (Dkt. No. 43).[6] Plaintiffs argue that "the 'gaping hole' on which Congress and the Court relied in the prohibition of intrastate manufacture and possession of marijuana has been filled by the State of California's implementation of its own comprehensive regulation," and plaintiffs emphasize that since *Gonzales* numerous additional states have legalized the use of marijuana for medicinal or recreational purposes. *Id.* at 19.

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[6] For ease of reference citations to page numbers refer to the ECF branded number in the upper right corner of the page.

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 the other courts that have addressed this question and concludes that plaintiffs do not have federally protected property interest in cultivating medical marijuana and thus that they cannot state a claim under § 1983 for violation of their due process rights. Because plaintiffs' due process claim fails, the fourth cause of action for conspiracy also fails as a matter of law. *See Avalos v. Baca*, 596 F.3d 583, 592 (9th Cir. 2010) (upholding dismissal of conspiracy claim where underlying constitutional claim was denied).

Accordingly, the Court GRANTS defendants' motions to dismiss the third and fourth causes of action without leave to amend.

## II. Equal Protection/Class of One

### A. First Cause of Action Against the County

The FAC alleges that the County denied plaintiffs' application for a permit to cultivate medical cannabis for irrational, arbitrary and impermissible reasons in violation of the Equal Protection Clause of the Fourteenth Amendment, and that plaintiffs "are the only AG40 applicants denied a permit who met the necessary requirements under category (B)(3) of the Ordinance and were approved for a permit by Diane Curry acting as the Interim Commissioner of the Department

of Agriculture and final decisionmaker for the County." FAC ¶ 56. Plaintiffs also allege that the December 4, 2018 amendment of the Ordinance "specifically targeted the Plaintiffs as the only qualified applicants in an agricultural area prohibited from cultivating cannabis based on change in zoning." *Id.* ¶ 57.

Plaintiffs' "equal protection claims do not require a constitutionally protected property interest." *Hermosa on Metropole, LLC v. City of Avalon*, 659 Fed. App'x 409, 411 (9th Cir. 2016) (citing *Outdoor Media Grp. v. City of Beaumont*, 506 F.3d 895, 903 (9th Cir. 2007)); *see also Kent*, 411 F. Supp. 3d at 1124 (separately analyzing medical cannabis cultivator's Due Process and Equal Protection claims and noting that "Plaintiff's only claim that does not specifically rely upon the identification of a constitutionally protected property right is his Sixth COA for Equal Protection."). The Equal Protection Clause ensures that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). "The Supreme Court has recognized that 'an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she has been irrationally singled out as a so-called 'class of one.'" *Gerhart*, 637 F.3d at 1021 (quoting *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 601 (2008)).

Defendants contend that plaintiffs have not stated a claim because the facts alleged in the FAC demonstrate that plaintiffs did not qualify for a (B)(3) permit. Defendants argue that (B)(3) applicants must satisfy

the requirements of Paragraph (B)(1) of the ordinance, and that (B)(1) requires evidence of both prior and existing cultivation at the "origin site." Defendants assert that the Court can infer from the FAC that plaintiffs only had evidence of prior cultivation at the Willits site and that at the time they applied for the (B)(3) permit, they were no longer cultivating at the Willits location. Thus, defendants argue, plaintiffs were not entitled to receive a (B)(3) permit and there was a rational basis for the permit denial. With regard to the rezoning, defendants argue that plaintiffs have not alleged that the County acted differently with regard to similarly situated cultivators in other proposed "rezones."

The Court concludes that as a pleading matter, plaintiffs have alleged enough facts to state a claim. Plaintiffs allege that Interim Commissioner Curry determined that they satisfied the requirements for a (B)(3) permit and that Curry was the final decisionmaker for the County with regard to the interpretation and implementation of the Ordinance. Plaintiffs also allege that they were the only AG40 applicants who met the (B)(3) requirements, as determined by Curry, who were denied a permit, and that they were specifically targeted in the "opt-out" rezoning process. These allegations are sufficient to state a claim that plaintiffs were intentionally treated differently than other similarly situated permit applicants without a rational basis. *See Gerhart*, 637 F.3d at 1022-24 (reversing summary judgment in favor of defendants on a class-of-one claim where plaintiff presented evidence

that he was treated differently than other property owners with regard to a permit denial). 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.[7]

### B. Second Cause of Action – Conspiracy

Defendant Anzilotti separately challenges the conspiracy allegations alleged against her in the second cause of action. "To state a claim for conspiracy to violate constitutional rights, 'the plaintiff must state specific facts to support the existence of a claimed conspiracy.'" *Olsen v. Idaho State Bd. Of Medicine*, 363 F.3d 916, 929 (9th Cir. 2004). A defendant's knowledge of and participation in a conspiracy may be inferred from circumstantial evidence and from evidence of the defendant's actions. *Gilbrook v. City of Westminster*, 177 F.3d 839, 856-57 (9th Cir. 1999).

The FAC alleges, *inter alia*, that (1) Anzilotti made a false report of water diversion on plaintiffs'

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[7] Defendants also assert that the entire action should be dismissed under the doctrine of *ex Turpi Causa Non Oritur Actio* because Congress did not intend 42 U.S.C. § 1983 to allow a plaintiff to receive monetary damages for a lost opportunity to engage in an enterprise forbidden by federal criminal statutes. The Court notes that plaintiffs seek declaratory and injunctive relief in addition to monetary damages, and reserves judgment on whether plaintiffs' claims for monetary damages are barred under this theory.

property in order to thwart the approval of plaintiffs' application to cultivate marijuana, leading to a CDFW raid on plaintiffs' property; (2) Anzilotti colluded with her neighbors and conspired with McCowen, Brown, and Croskey to create an "opt-out" process under which plaintiffs' property was rezoned; (3) Anzilotti was politically connected to McCowen and Brown and complained to them in private; and (4) plaintiff Gurr filed a complaint alleging that Anzilotti used her position as an "unsworn administrator" with the Sheriff's office to conduct personal business to influence decisions by County officials and employees that would personally benefit her. FAC ¶¶ 17, 31-32, 39-40, 45. The FAC also alleges, as part of the conspiracy allegations, that Curry was told by Deputy County Counsel Matthew Kiedrowski that McCowen would never allow plaintiffs' permit to be approved and that after Curry approved plaintiffs' permit, Kiedrowski intervened and prevented Curry from delivering the permit to plaintiffs. *Id.* ¶¶ 41-44.

Anzilotti contends that the conspiracy allegations are conclusory and do not show an agreement to engage in illegal conduct. Anzilotti also contends that even if plaintiffs have sufficiently alleged a conspiracy, she is immune from liability under the *Noerr-Pennington* doctrine. "Under the *Noerr-Pennington* doctrine, those who petition all departments of the government for redress are generally immune from liability." *Empress LLC v. City and County of San Francisco*, 419 F.3d 1052, 1056 (9th Cir. 2005). "Although the *Noerr-Pennington* doctrine originally immunized individuals

and entities from antitrust liability, *Noerr-Pennington* immunity now applies to claims under § 1983 that are based on the petitioning of public authorities." *Id.*

The Court agrees that the allegations against Anzilotti describe activities protected by the *Noerr-Pennington* doctrine. Most of the acts described in the FAC involve Anzilotti petitioning County officials and other government agencies to complain about plaintiffs' marijuana cultivation and efforts by her to have plaintiffs' property rezoned to prohibit marijuana cultivation. Courts have held similar activities to be immune from suit. In *Empress LLC*, hotel owners filed a § 1983 action against the City of San Francisco, various city officials, and the director of a nonprofit housing corporation, alleging that the city had unlawfully delegated zoning decisions to the nonprofit director by taking official actions consistent with the director's requests on zoning petitions affecting San Francisco's Tenderloin area. The hotel owners' claims against the non-profit director were based upon a letter the director sent to the San Francisco Zoning Administrator requesting a zoning determination and zoning enforcement, as well as a conversation between the director and the Zoning Administrator. *Id.* at 1054, 1056.

The Ninth Circuit affirmed the dismissal of the claims against the nonprofit director, holding the letter and conversation were protected petitioning activities. *Id.* The court rejected the argument that the "sham exception" to the *Noerr-Pennington* doctrine applied: "The Patels' complaint does not allege that Shaw used government processes, as opposed to the outcome of

those processes, as a mechanism to injure the Patels, and that therefore his petitioning activity falls under the sham exception to the *Noerr-Pennington* doctrine. As such, no matter what Shaw's motives were, his petitioning activity as alleged in the Patels' complaint is immunized under the *Noerr-Pennington* doctrine." *Id.* at 1057. The court further noted, "there is no 'conspiracy' exception to the *Noerr-Pennington* doctrine that applies when government officials conspire with a private party to employ government action as a means of depriving other parties of their federal constitutional or statutory rights." *Id.* (citing *City of Columbia v. Omni Outdoor Adver. Inc.*, 499 U.S. 365, 382-83 (1991)). "In such circumstances, a remedy lies only against the conspiring government officials, not against the private citizens." *Id.*

Plaintiffs concede in their opposition that "Defendant Anzilotti is immune for participating in legitimate lobbying activities which would include attending public meetings and both publicly and privately talking to officials." Pls' Opp'n at 15 (Dkt. No. 44). However, plaintiffs contend that the immunity does not extend to the allegations that Anzilotti made the false allegation of water diversion and that Anzilotti caused Kiedrowski to interfere with the permit process and prevented plaintiffs from receiving the permit approved by Interim Commissioner Curry.

The Ninth Circuit has held similar allegations to be within the ambit of the *Noerr-Pennington* doctrine. In *Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886 (9th Cir. 1988), real estate developers

brought suit for antitrust and civil rights violations against a city's redevelopment agency, the city, and another real estate developer, Koll. The plaintiffs alleged, *inter alia*, that Koll made "false reports and misrepresentations" to the city council with regard to a redevelopment plan. The Ninth Circuit affirmed the dismissal of the claims against Koll based on *Noerr-Pennington*:

> As pointed out by the Court in *Noerr*, attempts to influence public officials may occasionally result in "deception of the public, manufacture of bogus sources of reference, [and] distortion of public sources of information. . . . While we do not condone misrepresentations, we trust that the council and agency, acting in the public sphere, can "accommodate false statements and reveal their falsity"

*Id.* at 894 (internal citations omitted). Here, even if Anzilotti made a false report to CDFW about water diversion, that report is petitioning activity protected by the *Noerr-Pennington* doctrine. Further, the allegation that Anzilotti and CDFW agent Steve White "decided to use a false allegation of water diversion as a pretext to obtain a warrant and seize the plaintiffs' property" is conclusory and devoid of specific facts showing that Anzilotti and White conspired against plaintiffs. FAC ¶ 17.

Plaintiffs' arguments regarding the allegations about Deputy County Counsel Kiedrowski interfering with the permit process – insofar as those allegations relate to Anzilotti – fare no better. As an initial matter,

the FAC does not allege any direct connection between Anzilotti and Kiedrowski's actions. Instead, the FAC alleges that the conspiracy was initially formed between Anzilotti and CDFW agent White, later "evolved to include members of the Board of Supervisors, John McCowen and Carre Brown," and that "McCowen recruited Assistant County Counsel Matthew Kiedrowski to prevent the permit approved by Commissioner Curry from being delivered to the plaintiffs." *Id.* ¶ 39. There are too many inferential leaps required in order to connect Anzilotti with Kiedrowski's actions. Moreover, even if one engaged in those inferences, the only activities Anzilotti is alleged to have engaged in consists of petitioning activities protected by the *Noerr-Pennington* doctrine: complaining publicly and privately to McCowen, Brown, and other state and local agencies. *See id.* ¶¶ 17, 40, 44-45.[8]

Accordingly, the Court GRANTS defendant Anzilotti's motion to dismiss the FAC. Although the Court is skeptical that plaintiffs can state a claim against Anzilotti under section 1983, the Court will grant one final opportunity to amend the second cause of action.

## CONCLUSION

Accordingly, defendants' motions to dismiss the FAC are GRANTED IN PART and DENIED IN PART.

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[8] The FAC references the complaint Gurr filed against Anzilotti for allegedly misusing her "unsworn position" in the Sheriff's Office, but does not elaborate on that allegation or tie that allegation to the alleged conspiracy.

The first cause of action may proceed. The second cause of action as alleged against defendant Anzilotti is dismissed with leave to amend. The third and fourth causes of action are dismissed without leave to amend. If plaintiffs wish to amend the second cause of action, they may do so no later than **December 23, 2020**.

**IT IS SO ORDERED.**

Dated: December 13, 2020 /s/ Susan Illston
SUSAN ILLSTON
United States
District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| ANN MARIE BORGES, DBA Goose Head Valley Farms; CHRIS GURR, DBA Goose Head Valley Farms,<br>Plaintiffs-Appellants,<br>v.<br>COUNTY OF MENDOCINO; et al.,<br>Defendants-Appellees. | No. 22-15673<br>D.C. No. 3:20-cv-04537-SI Northern District of California, San Francisco<br>ORDER<br>(Filed Apr. 19, 2023) |

Before: WARDLAW, NGUYEN, and KOH, Circuit Judges.

The panel has unanimously voted to deny Appellants' petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. 35. The petition for rehearing en banc is **DENIED**.