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Via Electronic Mail

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Re: Response to Sanders Political Law Letter Concerning the Humboldt Cannabis Reform Initiative

Dear Chair Madrone and Members of the Board:

On April 20, 2023, our firm submitted a letter (the "April 20 Letter") addressing numerous errors and mischaracterizations of the Humboldt Cannabis Reform Initiative ("Initiative") in an "Analysis and Recommendations" document ("Analysis") prepared by Humboldt County staff. On May 18, 2023, at the behest of the Humboldt County Growers Alliance ("HCGA"), the Sanders Political Law firm submitted a letter (the "Sanders Letter") in response to the April 20 Letter.

First, the Sanders Letter fails to respond to our actual concerns regarding the limitations on County involvement in political campaigns. Indeed, the Sanders Letter largely misses the point of our April 20 Letter, which was to caution the County against using public funds to support further dissemination of the argumentative, inflammatory, and inaccurate statements in the Analysis. The Sanders Letter also fails to give a complete and accurate account of legal restrictions on the County's ability to participate in political campaigns at public expense. The County would be well advised to proceed cautiously and in accordance with the advice of independent counsel in this area.

Second, the Sanders Letter misconstrues the purposes and intent of the Initiative and incorrectly seeks to limit the flexibility it gives the County. The Sanders Letter's narrow, crabbed interpretation of the Initiative's purposes contradicts clear Supreme Court authority governing construction of initiative measures. The Sanders Letter spends several pages arguing—incorrectly—that the Initiative's purposes do not include protecting small farmers, but it does not dispute that the Initiative's purposes do include protecting the environment. The Sanders Letter thus offers no real response to the main point of our April 20 Letter: that Section 7.F of the Initiative gives the County leeway to advance the environmentally protective purposes of the Initiative through an implementing ordinance, which would not need to change the language of the Initiative itself and could be adopted without voter approval.

Finally, it bears mention that the HCGA seems to be pursuing an odd and self-defeating strategy here. The Sanders Letter acknowledges that the County has broad authority to interpret its own General Plan and that a court may well uphold an implementing ordinance along the lines suggested in our April 20 Letter. Yet the Sanders Letter nonetheless attempts to lay out a roadmap for legal challenges to an implementing ordinance—an ordinance that would *benefit* cannabis cultivators, including small farmers. This is counter-intuitive at best.

The Initiative's proponents are offering a common-sense, legally sound, and textually supported path to addressing concerns raised by HCGA and County planning officials. One would think that HCGA, as a representative of Humboldt County growers, would welcome and advocate for interpretations that help relieve those concerns. HCGA, in contrast, appears dedicated to advancing extreme and incorrect interpretations of the Initiative that would *hurt growers*. Asking the County to commit to those same erroneous interpretations before the Initiative is adopted threatens unnecessary harm to the very constituency HCGA claims to represent.

Accordingly, the County may wish to avoid publicly committing itself to HCGA's misinterpretation of the Initiative. HCGA may think that painting the Initiative as an "existential" or "catastrophic" threat serves its short-term political goals, but HCGA and its members—and the County—may come to regret this strategy in the long term should the Initiative pass.

The Sanders Letter's contentions are discussed in further detail below.

I. California Law Constrains the Use of Public Funds for Campaign Activity

The Sanders Letter argues at length that the County's discussion of the Analysis at a public meeting of the Board of Supervisors did not violate the Political Reform Act. The Sanders Letter either misunderstands or mischaracterizes our April 20 Letter, which simply cautioned the County that expending public funds on *further* dissemination of argumentative, inflammatory, and erroneous claims about the Initiative in the Analysis—in contrast to the neutral, factual information public agencies may lawfully provide to the voters—*could* be unlawful.

The Sanders Letter fails to provide a complete account of governing law. For example, the Sanders Letter omits any discussion of the leading California Supreme Court case in this area, *Stanson v. Mott* (1976) 17 Cal.3d 206, which established that absent specific statutory authorization, materials prepared at public expense must be limited to "fair presentation of the relevant facts" and cannot be used "to promote a partisan position in an election campaign." (*Id.* at 209-10, 220.) *Stanson* also recognized that materials purporting to be purely "informational" nonetheless have been found to be improper campaign materials based on the "style, tenor and timing" of their publication. (*Id.* at 222.)

The Sanders Letter cites only one case: *Vargas v. City of Salinas* (2009) 46 Cal.4th 1. In *Vargas*, however, the California Supreme Court affirmed that materials generated at public expense may be unlawful based on their "style, tenor and timing," even if they do not use the language of "express advocacy" in favor of or against a measure.[1] (*Id.* at 27-34.) Although *Vargas* ultimately upheld a city's dissemination of purely informational

[1] Government Code section 54964—which the Sanders Letter also does not mention—provides that "[a]n officer, employee, or consultant of a local agency may not expend or authorize the expenditure of any of the funds of the local agency to support or oppose the approval or rejection of a ballot measure." (Gov. Code § 54964(a).) Section 54964 defines an "expenditure" as the use of public funds for "communications that expressly advocate the approval or rejection" of a measure. (Gov. Code § 54964(b)(3). Section 54964 "does not prohibit the expenditure of local agency funds to provide information to the public about the possible effects of a ballot measure on the activities, operations, or policies of the local agency," any such information must constitute "an *accurate, fair, and impartial presentation of relevant facts* to aid the voters in reaching an informed judgment regarding the ballot measure." (Gov. Code § 54964(c), (c)(2) (emphasis added).) The Supreme Court in *Vargas* rejected the argument that section 54964 implicitly authorizes public agencies to engage in campaign activities so long as they do not "expressly advocate" defeat or passage of a measure. (*Vargas*, 46 Cal.4th at 32-34.)

material concerning the impact on city services of a ballot measure that reduced the city's utility tax, the Supreme Court noted that the material "avoided argumentative or inflammatory rhetoric." (*Id.* at 40.)

Here, in contrast, our April 20 Letter illustrated numerous argumentative, inflammatory, and inaccurate statements in the County's Analysis and at the Board of Supervisors meeting where the Analysis was produced. Notably, the Sanders Letter does not take issue with *any* of the specific errors identified in our letter.[2]

The main point of our April 20 Letter thus remains essentially undisputed. Expenditure of public funds on dissemination of argumentative, inflammatory, and inaccurate claims about the Initiative could cross the line into unlawful advocacy under *Stanson*, *Vargas*, and applicable Political Reform Act regulations. Improper use of public resources for campaign activities may result in both civil and criminal penalties. (*See, e.g.*, Gov. Code § 8314; Penal Code §§ 72.5(b), 424; *People v. Battin* (1978) 77 Cal.App.3d 635.)

Opponents of the Initiative are actively using the County's argumentative and inaccurate Analysis in their campaign materials.[3] We again respectfully urge the County to correct the errors in the Analysis that we identified in our April 20 Letter (or to withdraw the Analysis); to remove, and in the future to refrain from, argumentative and inflammatory rhetoric; and to proceed very cautiously in this area going forward.

II. The Initiative Gives the Board of Supervisors Flexibility to Adopt Ordinances that Further the Measure's Purposes

The Sanders Letter claims an implementing ordinance along the lines described in our April 20 Letter is not possible because the Initiative's purposes do not include protecting small farmers. The claim is both wrong and beside the point.

The Initiative clearly reflects the purpose of prioritizing small-scale cannabis cultivation. The Initiative's purposes are not limited to or narrowed by Section 1.A. As the California Supreme Court has held, the courts' "primary purpose" in construing an initiative measure is "giving effect to the intended purpose of the provisions at issue."

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[2] *See* Sanders Letter at 1 ("Please note that this letter's focus is limited to election law matters. It does not address the substantive legal analysis contained within the Analysis, or the rebuttal from the [April 20] Letter.").

[3] For example, HCGA has posted the Analysis to its website and has relied on the Analysis in its own materials. *See* https://www.nohcri.com.

(*Cal. Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 933.) "In doing so, we first analyze provisions' text *in their relevant context,* which is typically the best and most reliable indicator of purpose." (*Id.*, emphasis added) Courts also "tak[e] account of related provisions and the structure of the relevant statutory and constitutional scheme." (*Id.*) And if "the provisions' intended purpose nonetheless remains opaque, we may consider extrinsic sources, such as an initiative's ballot materials." (*Id.* at 934.) Applying these principles in a decision involving Proposition 218, a statewide initiative, the Supreme Court considered not only the operative text of the initiative but also its "findings and declarations," other sections of the initiative, ballot materials, and the overall constitutional history and context of the initiative. (*See id.* at 936-941.) The Sanders Letter's insistence that the County may consider only the words of Section 1.A in discerning the Initiative's purpose thus contradicts clear Supreme Court authority, and the Sanders Letter offers no authority to the contrary.[4] The Initiative's "purpose" and "intent" must be construed together, not separated in a manner which would frustrate the voters' initiative power.

The Initiative's plain text evidences a purpose of protecting small-scale cultivators. Indeed, the first goal that the Initiative would add to the General Plan is to "**Support small-scale, high-quality cannabis cultivation.** Structure and implement cannabis cultivation ordinances and policies that encourage small-scale production while minimizing environmental and social impacts." (Initiative Goal CC-G1.) It is difficult to imagine a clearer statement of purpose to protect small farmers, but if there were any doubt, the Initiative's findings (Initiative § 1.C.2-4) and the "Background" section it adds to the General Plan provide ample further confirmation. Under controlling law, Section 1.A of the Initiative must be read in light of this plain text and clear context.

Even if read in isolation, Section 1.A reflects the Initiative's overall purpose of protecting small-scale cultivation. Section 1.A plainly states that the purpose of the Initiative is to protect the environment from the effects of *large-scale* cannabis cultivation. This reflects not only the voters' intent to protect the environment, but also the voters' judgment that small-scale cannabis cultivation is not the source of the environmental damage the Initiative seeks to prevent.

Finally, even if the Sanders Letter were correct—which it is not—that the Initiative's purposes do not include "protecting small farmers," Section 1.A still would

[4] The Sanders Letter cites only one case, which addressed whether persons not licensed by the state Accountancy Board can hold themselves out as "accountants." (*Moore v. California* (1992) 2 Cal.4th 999, 1003-1004.) *Moore* did not address interpretation of an initiative measure and is inapposite here.

support the type of implementing ordinance discussed in our April 20 Letter. The Sanders Letter does not dispute that the Initiative's purposes include protecting the environment by limiting the intensity of cannabis cultivation and reducing water, energy, and resource usage. These purposes are entirely sufficient to support an implementing ordinance clarifying that the Initiative does not prohibit the addition of "structures" like water tanks and solar panels that lessen environmental impacts by reducing energy and resource usage. (*See* April 20 Letter at 5-6.) This could be accomplished by revising the County's definition of "structure," which is not part of the text of the Initiative and thus could be changed without voter approval. (*Id.* at 6.) The Board of Supervisors could adopt such an ordinance, without a vote of the people, if it determined such an ordinance is necessary.

Moreover, the Initiative would not prevent existing small-scale farms—those already under 10,000 square feet of total cultivation area—from adding structures or expanding cultivation activities, so long as the expanded operation did not exceed the limitations in Initiative Policy CC-P2.

In conclusion, we again respectfully urge the County to correct the errors and mischaracterizations in the Analysis that we identified in our April 20 Letter. We also ask that the County proceed both fairly and cautiously in evaluating the Initiative and disseminating information about its effects. The County must represent all of its residents, not just one industry, and thus should not take sides in this political campaign. Moreover, under prevailing law, the County *cannot* use public funds to spread inaccurate, inflammatory, or argumentative information in connection with the Initiative.

Thank you for your consideration. Please do not hesitate to contact me if you would like to discuss this matter further.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

Kevin P. Bundy

cc: Natalie Duke, Office of the County Counsel (via email)
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