



September 14, 2021

Governor Gavin Newsom
Office of the Governor
1303 10th Street, Suite 1173
Sacramento, CA 95814
Leg.unit@leg.ca.gov

Re: Assembly Bill No. 1302 Commercial cannabis billboards: placement restrictions

Dear Governor Newsom,

On behalf of *Getting it Right from the Start*, a project of the Public Health Institute, a 501c3 that has served California to promote public health for the past 55 years, and Youth Forward, a Sacramento-based youth advocacy organization, we strongly urge you to veto Assembly Bill No. 1302 *Commercial cannabis billboards: placement restrictions* (AB 1302), which passed the Senate with a one-vote margin. The Public Health Institute was the leading witness in opposition in legislative hearings. Contrary to its name, this bill allows rather than restricts cannabis billboards which will be seen by children and adolescents every day. This bill should be vetoed for several reasons:

1) **It is an inadmissible amendment of Proposition 64.** Allowing cannabis businesses to advertise or market on billboards or similar advertising devices along State and Interstate highways breaks with both the plain language of Proposition 64, which explicitly prohibited these billboards, and with the promises made to the people who voted to pass Proposition 64 (AUMA). The 2016 Voter Guide stated in reference to Prop 64: "*It controls, regulates and taxes marijuana use, and has the nation's strictest protections for children.*" (p.14); and it "*Prohibits marketing and advertising marijuana directly to minors.*" (p.90).

We commissioned a legal analysis of the issue from Mr. Michael Colantuono, of Colantuono, Highsmith & Whatley PC. Their analysis, (Appendix 1), concludes: "*AB 1302 exceeds the Legislature's authority because it contravenes AUMA's purpose to prevent billboard advertising of cannabis on an interstate or on a state highway which crosses the California border. Any expansion of that authority violates AUMA's plain language and exceeds the Legislature's authority.*" The statute as it was written was not ambiguous and clearly prohibits all advertising or marketing on a billboard or similar advertising device on an interstate or a state highway which crosses the California border. It makes no exception for any part of such highways. As the meaning of this provision of AUMA is apparent from its language, the Legislature "may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language."

2) **California parents, upset with exposure of their children to cannabis advertising on highways, had previously successfully sued** the former Bureau of Cannabis Control (BCC) when they included what are now AB 1302's proposed amendments in their regulations; a superior court held that these regulations conflicted with MAUCRSA, in *Farmer v. Bureau of Cannabis Control*, San Luis Obispo Superior Court Case No. 19-cv-0597 (Appendix 2). The court found AUMA and MAUCRSA to require a strict ban on all outdoor advertising of cannabis on any interstate or state highway that crosses the California border. Signing of this bill will inevitably lead once again to similar legal action against the state.

3) **Unlike many other forms of advertising, cannabis billboards on highways inevitably expose children and youth to advertising.** Youth exposure to outdoor advertising of cannabis, alcohol, or tobacco products

increases youth interest in, use, and positive perceptions of those products. While broadcast, print, and digital advertising can utilize audience composition data to limit advertising placement in media where youth are likely to be exposed, there is no relevant corollary for outdoor advertising, and no way to allow outdoor advertising without risking youth exposure. Children and teenagers on their way to school on a highway with a cannabis billboard will be exposed to this advertising every day. Historically, racial and ethnic minorities have also been exposed at higher rates to alcohol and tobacco billboards in California.

4) **Billboards increase youth frequent use and cannabis use disorder.** A recent study of 15-19 year-old cannabis users in 6 legalized states, including ours, found that exposure to cannabis billboards had a strong and significant relationship to frequent use and addiction. Among youth who saw billboards only sometimes, there were five-fold higher odds of cannabis use disorder. In those exposed frequently, seven-fold higher odds of weekly use and six-fold higher odds of cannabis use disorder was seen.¹

5) **Twelve other states do not allow cannabis billboards.** During Senate hearings Senators were informed by lobbyists that: "No other legalized state bans cannabis billboard advertising." Our review of laws of other states found that Alaska, Maine, Hawaii and Vermont ban all billboards; New York, Ohio, Rhode Island and Virginia ban cannabis billboards; Montana, Florida, Missouri, Connecticut and New Mexico essentially ban cannabis billboards through advertising restrictions that make them impermissible.

6) **Cannabis use directly contributes to increased motor vehicle crashes - why allow advertising on highways for a cause of more accidents?** The Insurance Institute for Highway Safety found a significant 5.9% increase in crash rates and a non-significant 3.8% increase in fatal crash rates after legalization and onset of retail sales nationally.²

7) **AB 1302 will cost the state money in greater youth substance abuse and motor vehicle accidents.**

8) **California's legal cannabis industry can operate well and profitably without billboards, as they do in a number of other states, and billboards will not solve the problem of the illicit market.** Consumers can easily locate legal cannabis retailers through print and online marketing. Online apps such as Weedmaps provide instant information on where to find a legal source. There is no evidence that billboard advertising by legal business is an effective strategy to address the challenge of the illicit market.

We respectfully ask that Governor Newsom hold true to voters, protect our kids and veto AB 1302.

Respectfully,



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¹ Trangenstein PJ, Whitehill JM, Jenkins MC, Jernigan DH, Moreno MA. Cannabis Marketing and Problematic Cannabis Use Among Adolescents. J Stud Alcohol Drugs. 2021 Mar;82(2):288-296. PMID: 33823976.

² Farmer CM, Monfort SS, Woods, AN. Changes in traffic crash rates after legalization of marijuana: Results by crash severity. Insurance Institute of Highway Safety. Ruckersville, VA. June 2021.

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MEMORANDUM

TO: Lynn Silver, Program Director
Public Health Institute

FROM: Michael G. Colantuono, Esq.
Aleks R. Giragosian, Esq.

RE: Lawfulness of AB 1302 Under Proposition 64 and the California
Constitution

FILE NO: 11343.0002

DATE: July 9, 2021

QUESTION PRESENTED

Is Assembly Bill No. 1302 (“AB 1302”) lawful under Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act (“AUMA”) and the California Constitution?

SHORT ANSWER

We conclude AB 1302 is not lawful under the AUMA and the California Constitution.

BACKGROUND

In 2016, California voters adopted Proposition 64, also known as the Control, Regulate and Tax Adult Use of Marijuana Act (“AUMA”). Proposition 64 amended the Medicinal and Adult-Use Cannabis Regulation and Safety Act (“MAUCRSA”) and is codified at Business & Professions Code section 26000 et seq. AUMA established regulations for cannabis advertising.

Assembly Member Quirk (D-Hayward) introduced AB 1302 to prohibit a licensee from advertising or marketing on a billboard or similar advertising device located within 15 miles of the California border on an interstate or state highway which crosses that

border. The Assembly approved AB 1302, and it is now pending in the Senate Committee on Business, Professions and Economic Development and the Senate Committee on Transportation.

BUSINESS & PROFESSIONS CODE SECTION 26152 & AB 1302'S PROPOSED AMENDMENT

Section 6.1 of Proposition 64 added Business & Professions Code section 26152, subdivision (d), stating a licensee shall not “[a]dvertise or market on a billboard or similar advertising device located on an Interstate Highway or on a State Highway which crosses the California border.”

AB 1302 proposes to amend Business & Professions Code section 26152, subdivision (d), to read as follows, with underlined text denoting additions: “Advertise or market on a billboard or similar advertising device located within a 15-mile radius of the California border on an Interstate Highway or on a State Highway which crosses the California border.” This has the effect of allowing cannabis advertising on most of the state’s highways and interstates.

THE LEGISLATURE’S AUTHORITY TO AMEND THE AUMA

Article II, section 10, subdivision (c) of the California Constitution states, “The Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors’ approval.” “[T]he voters have the power to decide whether or not the Legislature can amend or repeal initiative statutes. This power is absolute and includes the power to enable legislative amendment subject to conditions attached by the voters.” (*Howard Jarvis Taxpayers Assn. v. Newsom* (2019) 39 Cal.App.5th 158, 167.) “The purpose of California’s constitutional limitation on the Legislature’s power to amend initiative statutes is to ‘protect the people’s initiative powers by precluding the Legislature from undoing what the people have done, without the electorate’s consent.’” (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1484.)

Voters gave the Legislature limited authority to amend AUMA. Proposition 64’s section 10 states:

This act shall be broadly construed to accomplish its purposes and intent as stated in Section 3. The Legislature may by majority vote amend the

provisions of this act contained in Sections 5 to 5.5, inclusive, **and Sections 6 to 6.3**, inclusive, to implement the substantive provisions of those sections, provided that such amendments are consistent with and further the purposes and intent of this act as stated in Section 3 Except as otherwise provided, the provisions of the act may be amended by a two-thirds vote of the Legislature to further the purposes and intent of the act.

Further, Business & Professions Code section 26000, subdivision (d), states, “The Legislature may, by majority vote, enact laws to implement this division, provided those laws are consistent with the purposes and intent of the Control, Regulate and Tax Adult Use of Marijuana Act.” Thus, while the Legislature may implement AUMA by simple majority; it may change its substantive provisions only by a bill adopted on two-thirds approval and only to the extent “consistent with the purposes and intent” of AUMA.

AB 1302 AMENDS THE AUMA

An amendment is any change of the scope or effect of an existing statute, whether by addition, omission, or substitution of provisions, which does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise, or supplement, or by an act independent and original in form A statute which adds to or takes away from an existing statute is considered an amendment.

(*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 22.) “Applying this definition and related formulations . . . , courts have determined that certain statutes constitute impermissible amendments of initiative measures.” (*People v. Kelly* (2010) 47 Cal.4th 1008, 1027.) AB 1302 is an amendment; it greatly limits the scope of AUMA’s restriction on billboards along highways.

STANDARD OF JUDICIAL REVIEW OF STATUTES WHICH AMEND INITIATIVES

Starting with the presumption that the Legislature acted within its authority, we shall uphold the validity of a legislative amendment if, by any reasonable construction of the initiative, it can be said that the statute complies with the initiative’s conditions for enacting legislative amendments.

(*O.G. v. Superior Court of Ventura County* (2021) 11 Cal.5th 82, 91.) “[A] legislative amendment that alters and conflicts with a fundamental purpose or primary mandate of

an initiative does not further the purpose of the initiative and is invalid.” (*Howard Jarvis Taxpayers Assn. v. Newsom* (2019) 39 Cal.App.5th 158, 174.)

In discerning the purposes of a proposition, we are guided by, but are not limited to, the general statement of purpose found in the initiative. Evidence of its purpose may be drawn from many sources, including the historical context of the amendment, and the ballot arguments favoring the measure.

(*O.G. v. Superior Court of Ventura County, supra*, 11 Cal.5th at p. 91.)

We first consider the initiative’s language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters’ intent and understanding of a ballot measure.

(*People v. Nash* (2020) 52 Cal.App.5th 1041, 1054.)

AB 1302 EXCEEDS THE LEGISLATURE’S AUTHORITY

Business & Professions Code section 26152, subdivision (d), is not ambiguous. The statute prohibits all advertising or marketing on a billboard or similar advertising device on an interstate or a state highway which crosses the California border. It makes no exception for any part of such highways. As the meaning of this provision of AUMA is apparent from its language, the Legislature “may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language.”

The expansive scope of AUMA’s language was intended to avoid a potential conflict with federal law. Section 11 of Proposition 64 states:

[N]o provision or provisions of this act shall be interpreted or construed in a manner to create a positive conflict with federal law, including the federal Controlled Substances Act, such that the provisions of this act and federal law cannot consistently stand together.

Section 26152 clearly applies to interstate marketing of a federally illegal substance, which is why there is no provision limiting advertising and marketing on highways that are located entirely within the State – which are maintained partly with federal funds.

BCC included what are now AB 1302's proposed amendments in its regulations and a superior court invalidated them in *Farmer v. Bureau of Cannabis Control*, San Luis Obispo Superior Court Case No. 19-cv-0597. In 2019, the BCC adopted regulations to restrict billboard advertisements within a 15-mile radius of the California border. According to a Senate analysis of AB 1302:

The BCC determined that a 15-mile radius was an appropriate distance from the California border because: 1) it satisfied the intent of Prop 64, and 2) it provided assurance that licensees, including those located in jurisdictions along the California border, would still have an opportunity to advertise and market their commercial cannabis operations within the radius limitations.¹

A California resident sued in November 2020, claiming the BCC's regulations would "unnecessarily expose him and his teenage children to cannabis advertising," which are interests inconsistent with the protection of the public. BCC argued that its regulations attempted to implement provisions in a constitutional manner despite a lack of guidance on the purpose behind the interstate highway language in MAUCRSA. Cannabis companies that are in support of this bill did not have standing to be able to file an amicus brief in that case.²

On January 11, 2021, the San Luis Obispo Superior Court granted summary judgment to the plaintiff, concluding the BCC regulation conflicts with MAUCRSA. The court found AUMA and MAUCRSA to require a strict ban on all outdoor advertising of cannabis on any interstate or state highway that crosses the California border.

Even assuming AUMA's language on this point were ambiguous, "advertisement" and "marketing" are defined broadly under Business & Professions Code section. 26150, subdivision (b) and (e), respectively and give further support to our interpretation of

¹ Senate Comm. On Bus. Profess. & Econ. Dev. (2021-2022 Reg. Sess.) Assem. Bill No. 1302, as amended on Mar. 18, 2021.

² *Ibid.*

Dr. Lynn Silver
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Proposition 64 to broadly prohibit cannabis advertising on interstate highways and state highways which cross the border as voters are charged with knowledge of legal definitions in existence at the time they act.

CONCLUSION

We conclude AB 1302 exceeds the Legislature's authority because it contravenes AUMA's purpose to prevent billboard advertising of cannabis on an interstate or on a state highway which crosses the California border. Any expansion of that authority violates AUMA's plain language and exceeds the Legislature's authority.

If we can provide further advice on this subject, please let us know. Thank you for the opportunity to assist.

13 Moreover, this argument is belied by the fact that the Advertising Placement
14 Regulation uses identical terms, Interstate Highways and State Highways, as the
15 Advertising Placement Statute, without further definition. Moreover, these terms are
16 defined in Streets and Highways Code sections 23, 24, 300, et seq., 746(h), and the
17 Bureau did not seek in its regulation to clarify which of the routes would be subject to
18 the regulation. Thus, it does not appear that the Advertising Placement Regulation
19 sought to clarify ambiguities in these terms as argued.

20 Defendants further argue that the Court should construe the statutory framework
21 and implementing regulations as a whole and that the Advertising Placement Regulation
22 is consistent with and reasonably necessary to ensure the viability of the statewide
23 commercial market and advance the policy goals of Proposition 64, while at the same
24 time ensuring public protection. They argue they argue that the voters never articulated
25 an unequivocal ban on licenses engaging in truthful marketing and advertising on
26 billboards.

27 Nonetheless, the Court finds that the Bureau exceeded its authority in
28 promulgating the Advertising Placement Regulation. The Advertising Placement

1 Regulation is clearly inconsistent with the Advertising Placement Statute, expanding the
2 scope of permissible advertising to most of California's State and Interstate Highway
3 system, in direct contravention of the statute.

4 "Regulations that alter or amend the statute or enlarge or impair its scope are
5 void." (*Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 300.) The
6 Bureau argued in promulgating the regulation that it was clarifying the application of the
7 Advertising Placement Statute, however that statute was clear on its face, and the
8 Bureau's interpretation of the statute went beyond its authority.

9 The Advertising Placement Regulation conflicts with the Advertising Placement
10 Statute and is invalid under Government Code section 1134.2.

11 12 **CONCLUSION**

13 Plaintiff's Petition is granted. Whether Plaintiff shall be entitled to attorneys'
14 fees under Code of Civil Procedure section 1021.5 shall be determined pursuant to
15 subsequent motion. Plaintiff is to provide an order to the Court for signature, consistent
16 with this Ruling, after meeting and conferring with Defendants. If the parties are unable
17 to agree on an order, the matter may be placed on an ex parte calendar, with notice, for
18 the Court to consider the proposed Order.

19 20 **EVIDENTIARY OBJECTIONS**

21 The Court sustains Defendants' evidentiary objection number 16.

22 The Court overrules Defendants' evidentiary objections numbers 1-9, 25-30, and
23 37-40 which object to portions of Petitioner's briefs, on the grounds that these
24 provisions are argument, not evidence. The Court considered them only as argument, not
25 evidence.

26 The Court overrules Defendants' evidentiary objections numbers 10-13, and 17,
27 on the grounds that they are submitted in support of the issues of ripeness and standing.
28 They were not considered when deciding the validity of the regulation itself.

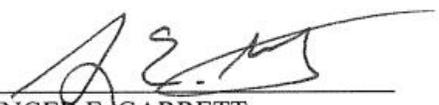
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The Court sustains Defendants' evidentiary objection number 32.

The Court declines to rule on objections 14, 15, 18, 19-24, 31, and 33-36, as the Court did not rely on the evidence to which Defendants object and it was immaterial to the Court's decision.

DATED: November 20, 2020

GEG:jn


GINGER E. GARRETT
Judge of the Superior Court