Sanders Political Law
1121 L Street, Suite 105, Sacramento, CA 95814

May 18, 2023

VIA EMAIL ONLY

Chair Steve Madrone and Members
Humboldt County Board of Supervisors
825 5th Street
Eureka, CA 95501

John Ford, Director
Humboldt County Planning and Building Department
6015 H Street
Eureka, CA 95501

RE: Clarifications on Election Law Issues Raised In April 20, 2023 Letter from Kevin P. Bundy

Dear Chair Madrone, Members of the Board, and Director Ford:

On behalf of my client, the Humboldt County Growers Alliance ("HCGA"), we want to provide the Board of Supervisors with election law information which may help it respond to the April 20, 2023 letter from Kevin P. Bundy (the "Bundy Letter"). The Bundy Letter takes issues with the "Humboldt Cannabis Reform Initiative Analysis and Recommendations" (the "Analysis") in which the County analyzes the effect of the "Humboldt Cannabis Reform Initiative" (the "Initiative").

This letter addresses two election law issues. First, it provides the County with the correct legal analysis demonstrating that production and dissemination of the Analysis is permissible and proper, and that public officials are permitted to make their opinions about the Initiative known at public meetings and hearings. The activity discussed in the Bundy Letter has been clearly deemed informational by the California Supreme Court, and does not constitute campaign activity. It does not violate any campaign finance laws and does not constitute an impermissible use of public funds. Second, this letter highlights the difficulty in determining whether and how the Initiative may be amended or adjusted under California election law rules, and demonstrates that projects to amend or adjust the Initiative are not nearly as simple as the Bundy Letter alleges. The Analysis's interpretation of the Initiative is supported by the plain text of the law, and, notably, the Initiative does not have the clear purpose of protecting small farmers. If the Initiative were to pass, then its myriad problems could not be easily remedied without an additional vote of the People.

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 Bundy Letter. The County is an expert on its own law and will

decide how the Initiative, if approved by voters, is implemented. As a general matter, HCGA agrees that the Analysis accurately interprets the Initiative and properly highlights some of the most critical legal issues caused by the poorly conceived Initiative. HGCA will continue to provide its expert opinion and analysis on the substantive legal issues raised by the Initiative in other forums, including how the Initiative poses an existential threat to Humboldt County's small farmers.

Neither the County's Production nor Dissemination of the Analysis Violate Campaign Finance Laws.

The Bundy Letter claims that dissemination of the Analysis "could constitute an 'independent expenditure' under Government Code section 82031" and "would violate the Political Reform Act." (Bundy Letter, page 14.) That is simply false, and Court cases cited in the Bundy Letter specifically permit the production and dissemination of the Analysis, as well as the expression of opinions regarding the Initiative by public officials and employees.

The most relevant case analyzing the laws at issue is *Vargas v. City of Salinas* (2009) 46 Cal.4th 1. In *Vargas*, the City of Salinas had engaged in several actions related to a municipal ballot measure which would have reduced the City's budget. Part of the City's actions included producing a report pursuant to the Elections Code, as well as holding public hearings at which City departments identified specific programs which would be cut if the measure was approved by voters and passing a resolution identifying these programs. The hearings held included the expression of negative opinions about the ballot measure by public officials and employees.

Plaintiffs in the *Vargas* case – proponents of the ballot measure at issue – did not even challenge these actions, because they are so clearly within a local jurisdiction's authority. Nonetheless, the *Vargas* Court decided to make clear that such activity was permissible, noting that, "even had plaintiffs advanced such an argument, we have no doubt that the city council, pursuant to its general legislative power, possessed the authority to identify, with specificity and in advance of the November 2002 election, the particular services and programs that the council would reduce or eliminate should Measure O be adopted at the upcoming election. Plaintiffs and other supporters of Measure O were free, of course, to challenge the necessity or wisdom of the proposed service and program reductions approved by the city council, and to urge voters to replace the current city council members with officeholders who would take different action should the voters approve the repeal of the UUT at the November 2002 election. But it is clear that the city council had the authority to inform city residents, prior to the election, of the specific actions the current city council would take if the UUT were repealed." (*Vargas*, at 21-22.)

Here, the County has engaged the same type of activity that the City of Salinas did – it produced an analysis of the Initiative as permitted by Elections Code and held hearings regarding that analysis at which some opinions expressed by public officials and employees – but the County comes nowhere close to the degree of actions which are clearly permitted by the California Supreme Court in *Vargas*. None of the actions identified in the Bundy Letter are a cause for concern, and there is simply no basis to claim that that the production or dissemination of the Analysis, or the expression of opinions by public officials, even implicates campaign finance laws.

The Bundy Letter further alleges as relevant some statements made at public meetings related to the Analysis – statements which it claims are problematic because they are "not neutral and fair presentations of relevant facts." (Bundy Letter, page 13.) It claims that these statements made at public meetings provide a basis to find that the Analysis can constitute an independent expenditure, and seems to imply that public hearings cannot express an opinion on the Initiative. That also is false.

The *Vargas* Court specifically analyzed public hearings held by the City of Salinas at which numerous public employees provided their negative opinion of the measure at issue, identified specific programs which would be cut and then publicized the City's findings. Regarding those activities, the *Vargas* Court stated, "In the present case, the city council. . . had the authority to decide, in advance of the election, which services would be cut should the measure be adopted, and then to inform the City's residents of the council's decision. In posting on the City's Web site the detailed minutes of all the city council meetings relating to the council's action, along with the detailed and analytical reports prepared by the various municipal departments and presented by department officials at city council meetings, the City engaged in permissible *informational* rather than *campaign* activity, simply making this material available to members of the public who chose to visit the City's Web site." (Vargas, at 37; emphasis original.)

The *Vargas* Court further concluded that the expression of an opinion at a public meeting does not constitute an impermissible use of public funds or render the report upon which such hearings are based to be an independent expenditure, stating, "The potential danger to the democratic electoral process to which our court adverted in *Stanson* is not presented when a public entity simply informs the public of its opinion on the merits of a pending ballot measure or of the impact on the entity that passage or defeat of the measure is likely to have." (Vargas, at 36; citation omitted.)

Here, the County's consideration of the Analysis has been purely informational, and it is perfectly permissible for County officials and employees to offer their opinions about the Initiative at public meetings, including by discussing the severe negative impacts that the Initiative will have on Humboldt

County. It is not the County's fault that the Initiative might pose an existential threat to small farmers, and it does not engage in campaign activity simply by considering that fact. In reality, the County's consideration of the Initiative has been considerably more fair than the City of Salinas's actions which were analyzed in *Vargas*. County officials and employees have engaged in good faith with the Initiative's content, and have operated well within the guidelines set forth by the *Vargas* Court.

It should be noted that *Vargas* provides County officials and employees wide latitude to express opinions regarding the Initiative's effects on the County – even if those opinions are negative – without rendering their actions to be campaign activity. However, County officials and employees enjoy even wider latitude outside of the public hearing context, and are absolutely permitted to engage in campaign activity to oppose the Initiative. For example, both elected officials and public employees are legally permitted to:

- Officially endorse the defeat of the Initiative;
- Publicly urge voters to vote "no" on the Initiative, so long as they do not use their official letterhead or a public phone/email address;
- Appear on campaign advertisements opposing the Initiative, including using their official public titles for identification purposes;
- Work on the campaign opposing the Initiative during their personal time;
- Contribute personally to the campaign opposing the Initiative;
- Attend a fundraising event for the campaign opposing the Initiative; and
- Fundraise for the campaign opposing the Initiative, so long as they do not solicit other public employees and comply with all conflict of interest rules.

Finally, to the extent that the Bundy Letter seeks a "neutral" presentation of facts, it should be noted that the County has no obligation to provide some balance on behalf of proponents. The *Vargas* Court was clear in stating, "Because the proponents of Measure O spoke and made presentations at a number of city council meetings, summaries of the proponents' positions were included in the minutes of those meetings, were posted on the Web site, and thus were available to persons who visited the Web site, but *the City had no obligation to provide the proponents of Measure O with special access to enable them to post material of their own choosing on the City's official Web site*." (Vargas, at 37; emphasis added.) Here, the Initiative proponents are similarly permitted to appear at public hearings and provide their own opinions of the Analysis and its consideration. There are no additional obligations owed to them.

In sum, the Bundy Letter is simply wrong that the County may have violated campaign finance laws, or implicated any laws related to the misuse of public funds. The County is permitted by statute to produce and disseminate the Analysis, and it may hold hearings at which County employees and officials

express their opinion on the effect of the Initiative. The County's attention to the Initiative thus far have been purely informational, and County officials and employees have engaged in good faith with the Initiative's ill-conceived provisions. The California Supreme Court has clearly stated that County officials and employees are permitted to express negative opinions about the Initiative, and the County has no obligation to hold public meetings which are "fair" and "neutral." (See, Bundy Letter at 13.) HGCA hopes that the County will continue to investigate the impact of the Initiative so that the public can be properly informed prior to the March 2024 election.

The Board of Supervisors Cannot Merely Amend the Initiative to Fix the Myriad Problems Identified in the Analysis.

The Analysis raises serious concerns regarding the Initiative's plain legal language, and correctly notes that the Initiative precludes the Board of Supervisors from amending most or all of that problematic legal language. In response, the Bundy Letter in numerous places alleges that the significant issues raised in the Analysis can be easily remedied through amendment or adjustment of the Initiative's implementation by the Board of Supervisors, citing to Section 7.F of the initiative, which allows the Board to enact "implementing ordinances." However, the Bundy Letter is wrong about the impact of Section 7.F, and it appears that the Initiative may not be amended or adjusted in order to protect small farmers.

A. The Initiative Severely Limits Any Amendments.

As a general matter, the California Election Code prohibits the Board of Supervisors from amending an initiative approved by County voters unless that initiative provides for such amendment. (Cal. Elec. Code section 9125.) The Initiative incorporates this requirement by stating, "Except where otherwise provided herein, this Initiative may be amended or repealed only by the voters of Humboldt County." (Initiative, Section 10.) In other words, the assumption must be that the Board of Supervisors is not permitted to amend the Initiative, or adjust its implementation, in any way, unless it can find a specific grant of authority to do so within the text of the Initiative.

The Initiative does provide some capacity to amend its language or adjust the terms of its implementation, though the system for amending or adjusting the Initiative are perhaps the most complicated I have seen among the dozens of initiatives I have drafted or worked on. The Initiative provides limited authority for the Board of Supervisors to amend or adjust its legal language in two ways: some Initiative provisions specifically permit Board amendment to those provisions, and the Initiative generally permits the Board to enact "implementing ordinances. . . as necessary, to further the purposes of [the] Initiative." (Initiative, section 7.F.) The Bundy Letter asserts that these provisions render

most or all of the Analysis moot, because – it claims – the Board of Supervisors can simply enact an implementing ordinance under Section 7.F to adjust the implementation of the Initiative's legal language, and thereby avoid the numerous and serious problems raised in the Analysis. But the Bundy Letter fails to address the nuance of Section 7.F's language, and its conclusory remarks therefore provide no basis to conclude that the Initiative can be amended or adjusted in the ways it claims.

B. Section 7.F Does Not Permit Amendment to The Initiative's Language.

The Bundy Letter includes conclusory statements which indicate that the Board of Supervisors can use implementing ordinances to address its concerns regarding the Initiative pursuant to Section 7.F, but it is important at the outset to note that Section 7.F's plain language does not to permit any direct amendment to the Initiative's language. Reading Section 7.F to permit any such amendment conflicts with Section 10, which prohibits amendment – absent a clear provision permitting amendment – without a vote of the People. Section 7.F must instead be read as permitting a separate ordinance which does not amend the Initiative's language. In other words, the County is stuck with the Initiative's language as it is written.

For example, where the Analysis notes a problem with implementing the Initiative's permitting restrictions regarding "new and expanded" cultivation projects, Section 7.F's remedy is not to change the Initiative's language in a way that would permit current permit holders to, for instance, install a solar array. An "implementing ordinance" is certainly not a general plan amendment. (See Cal. Govt. Code section 65350, et seq [strict requirements for preparation, adoption and amendment of General Plan].) Instead, the Board may have some right under Section 7.F to add new language to the County Code in order to adjust the Initiative's effect – the Bundy Letter suggests an amendment to the Zoning Ordinance. But such an ordinance faces serious impediments.

C. The Initiative Does Not Have the Purpose of Protecting Small Farmers.

The most serious impediment to passage of an implementing ordinance is that the Board is restricted in how and why such ordinances may be enacted – most notably, the Board may not enact an implementing ordinance to protect Humboldt County's small farmers. The specific amendment provisions which allow the Board of Supervisors to amend certain provisions within the Initiative are not cited in Bundy Letter, but nonetheless provide a basis to understand additional limits on the ability for the Supervisors to enact implementing ordinances under Section 7.F.

As an example, Section 2 of the Initiative sets forth amendments to the Humboldt County general plan. There are three subsections within it. The first

two subsections set forth the Initiative's substantive additions and amendments to the General Plan, and the Initiative makes clear that these two sections may not be amended without a vote of the people, except that the definitions set forth in 2.A.1 may be amended in order "to conform to future amendments to definitions of the same or similar terms in state statutes and regulations." (Initiative, Section 2.A.1.) The third subsection amends General Plan Appendix A, and permits Board of Supervisor amendment "during the course of further updates and revisions to the General Plan, in a manner consistent with the purpose, intent, goals, policies, standards, and implementation measures of the General Plan set forth in Sections 1 and 2.A." (Initiative, Section 2.A.2.) In each of these provisions, the Board of Supervisors is provided only nominal capacity to amend dramatic changes to the County's General Plan. In the former, it may act only if the state acts first. In the latter, it may act only when such action is a part of other updates and revisions to the General Plan – a process which typically occurs every quarter century. In other words, these specific amendment provisions are extremely unlikely to constitute the grant of authority necessary to address the infirmities identified in the Analysis.

These sections therefore do not provide an outlet for the Board of Supervisors to resolve the Initiative's infirmities. They do however provide relevant context for review of the Bundy Letter by demonstrating the limits of the capacity of the Board of Supervisors to enact implementing ordinances under the Initiative's Section 7.F. Compare the provision permitting Board of Supervisor amendment to the General Plan Appendix A "in a manner consistent with the purpose, intent, goals, policies, standards and implementation measures of the General Plan," with the provision permitting the Board of Supervisors to enact implementing ordinances "to further the purposes of this Initiative." (Initiative, Section 2.A.2; Initiative, Section 7.F.) Under the rules of statutory construction, the exclusive inclusion of the word "purposes" means that Section 7.F should be read to omit as the basis for an implementing ordinance any consideration of "intent, goals, policies, standards and implementation measures." (See, *Moore v. California* (1992) 2 Cal.4th 999, 1011-1012 [courts will interpret lists by determining the meaning of each term by reference to others].) In other words, enactment of implementing ordinances must be based on the more narrow "purposes" of the Initiative, and the Board must determine what constitutes the Initiative's purposes before determining whether it has the authority to enact an implementing ordinance.

The Initiative helps define the term "purposes" in Section 4.B by stating that the "purpose and intent of the Initiative [is] set forth in Section 1, [and that] the goals, policies, standards, and implementation measures [are] set forth in Section 2." Therefore, Section 1 contains "purposes" and "intent" of the Initiative. Section 7.F requires further narrowing, however, because it omits the term "intent" from consideration of whether an implementing ordinance is authorized by the Initiative.

Section 1 sets forth three subsections. The first is titled "Purpose," and is clearly relevant to consideration of implementing ordinances under Section 7.F. (Initiative, Section 1.A.) Arguably, this section is the only relevant one to determine the Initiative's purposes because – as its title denotes – it is the section which clearly defines purposes. The second subsection is titled "Effect," and it sets forth the intended effect of the Initiative on County law. (Initiative, Section 1.B.) Because this subsection seems to set forth the intent of of the Initiative's effects, it would seem to clearly be considered the "intent" of the Initiative, and therefore it cannot be considered a part of the "purposes" which can form the basis to enact implementing ordinances. The third subsection is titled "Findings," and mimics the drafting of legislation by legislative bodies. (Initiative, Section 1.C.) Findings in such legislation are meant as a declaration of legislative intent in passing the Initiative – the facts predating the law which caused its passage – and not as a declaration of purpose regarding how the language should be implemented in the future. Though some language in the "Effect" and "Findings" subsections may provide relevant information about the Initiative's purposes, it would need to be specifically spelled out as such a purpose in order to be relevant to the Board of Supervisor's rationale. Otherwise, these sections seem to be part of the Initiative's "intent," and therefore specifically precluded from consideration by the Board when deciding whether it has the authority to enact implementing ordinances under section 7.F.

In looking at this limit on implementing ordinance to the "purposes" of the Initiative, HCGA's biggest concern is that the Board of Supervisors cannot enact any implementing ordinances based on the Board's desire to protect small cultivators. Nothing in Section 1.A mentions small cultivators, and so the most clear reading of Section 7.F simply precludes consideration of small cultivators as a the basis for an implementing ordinance that "furthers the purposes of the Initiative." Section 1.B – to the extent it may include Initiative purposes – also includes no reference to small local farmers, and can provide no basis for the Board of Supervisors to enact an ordinance to protect small cultivators. There are several references to "small-scale" cultivation in Section 1.C's "Findings," but none of those references actually declare that the Initiative seeks to protect such farmers as a purpose of the Initiative. These references merely mention small farmers positively, and therefore cannot be said to state a "purpose" that the Initiative protect small farmers. At best, these references evidence an intent that the Initiative be passed based on the actions of large cultivators rather than small ones, but – as discussed – such intent is distinguished in the Initiative from its purposes, and therefore cannot form the basis for an implementing ordinance.

Finally, an additional restriction prevents Section 7.F from being freely used in the manners suggested in the Bundy Letter. Section 7.F permits the Board to enact an implementing ordinances "as necessary, to further the purposes of [the] Initiative." The term "as necessary" sets forth a distinct

restriction which requires the Board of Supervisors to declare that any implementing ordinance be necessary to further the purposes of the Initiative. Section 7.F therefore does not permit the Board of Supervisors to simply "fill in the blanks" where it believes an ambiguity might exist. Instead, the Board must identify a problem and a specific purpose of the Initiative, and then articulate a reason that changes to the County Code are necessary to further that specific purpose of the Initiative by resolving that problem.

The Bundy Letter ignores Section 7.F's restrictions, and glosses over its exclusive focus on the "purposes" of the Initiative to make conclusory proclamations that the Board is permitted to use implementing ordinances to address infirmities raised in the Analysis. In its gloss over these clear legal constraints, the Bundy Letter claims that "The Initiative's purposes and goals are clear: (1) to protect Humboldt County's environment from impacts of cannabis cultivation, particularly water usage and energy consumption; (2) to protect Humboldt Count's historic small-scale, high quality cannabis industry against threats from larger-scale operations." (Bundy Letter, page 3.) This statement has three serious problems. First, it does not claim that protecting small farmers is a purpose of the Initiative – it could be a purpose or a goal, but only one of those can form the basis for the Board of Supervisors to enact an implementing ordinance. Second, it is simply incorrect when it states that the Initiative seeks to protect small farmers. As discussed above, there is no clear statement that the Initiative has the purpose to protect small farmers. And third, it provides no clear indication of what implementing ordinance can be implemented to actually protect small farmers from the Initiative's harmful infirmities.

In sum, the Initiative does not have the clear purpose of protecting small farmers, and the Board of Supervisors does not have the authority to enact implementing ordinances in the manner proposed in the Bundy Letter. Even if the Board were to enact an implementing ordinance as the Bundy Letter suggests, it will run into significant problems when the ordinance is challenged in court.

D. <u>The County Will Likely Face Litigation If It Attempts to Enact Implementing Ordinances Proposed in the Bundy Letter</u>.

A specific example of how this might look in real life can be found in the Bundy Letter's rebuttal to the Analysis's contention that General Plan Policy CC-P5 raises concerns for small farmers who hold multiple permits. The Initiative language at issue limits the number of "permits" which landowners can obtain, and the relevant Initiative language at issue uses "permit for cannabis cultivation" in some instances and simply "permits" in others.

The rules of statutory construction indicate that these terms should generally be treated as distinct terms with different meanings because different words are used in the same statute. (See, *Mendoza v. Nordstrom, Inc.* (2017) 2

Cal.5th 1074, 1087-1088 [applying rule against surplusage to find that different words in same statute cannot have the same meaning].) The Analysis uses that statutory interpretation rule to find that the Initiative might preclude, for instance, the holder of a cannabis cultivation permit from obtaining a tourism permit. The Bundy Letter takes issue with the Analysis's reasonable interpretation of the Initiative's plain text by stating that CC-P5 "explicitly references 'permit[s] for commercial cannabis cultivation." [and that] Later references to a 'permit' in the same sentence are also to permits for commercial cannabis cultivation." (Bundy Letter, pages 7-8.) While certainly a clever argument which can be raised before a court analyzing the issue, the Analysis's interpretation is as correct – and perhaps more correct – in suggesting that the term "permit" might mean something other than "commercial cannabis cultivation."

If the Initiative were to pass, then the Analysis seems to indicate that the Initiative's plain language as may preclude a cannabis cultivation permit holder of any size from also holding a nursery, processing, distribution or tourism permit. This is a legally sound interpretation, and the County will ultimately decide the best way to interpret the Initiative's plain language. If the County interprets the Initiative's language to preclude a cultivation permit holder from obtaining a tourism permit, then the Board of Supervisors may wish to enact an implementing ordinance to codify the Bundy Letter's alternative interpretation of the Initiative Language. The Board would then needs to do three things: (1) determine what portions of the County Code can be amended to effectuate that change, (2) declare that such a change is necessary to further the purposes of the Initiative, and (3) find a specific basis to justify the reason that such an ordinance actually furthers the purposes of the Initiative.

Despite the Bundy Letter's claims, the Initiative does not enumerate the protection and promotion of small farmers as a purpose. So, if the Board of Supervisors passes an ordinance claiming that the protection or promotion of small farmers justifies its necessary implementing ordinance, then that ordinance may be challenged. Given the litigious nature of Humboldt County residents and interest groups, the County should consider such litigation likely.

Once before a court, a judge will look at the plain language of the Initiative first. As discussed above, the plain language seems to severely limit the basis for implementing ordinances only to the Purposes found in Section 1 of the Initiative, and there is no basis to conclude that the Board of Supervisors can enact an implementing ordinance in order to protect small farmers based on Section 1. If the judge nonetheless finds some ambiguity in the purposes, then he or she can look at legislative intent. But legislative intent in the initiative context is severely limited – a Court will only look at the materials presented in the text of the measure and in the ballot pamphlet to analyze an ambiguity. (See, e.g., *California Cannabis Coalition v. Upland* (2017) 3 Cal. 5th 924, 940-941.) The

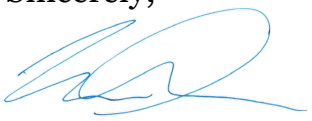
Bundy Letter's assertions are not admissible. Initiative proponents' claims are not admissible. Simply put, the judge will be stuck with the same language analyzed above, will have no basis to determine that the Board of Supervisors is permitted to act to protect small farmers, and will likely overturn the implementing ordinance as an impermissible attempt to amend an initiative by ordinance, rather than by a vote of the People.

In sum, the process for amending the Initiative is not as simple as the Bundy Letter alleges, and its conclusory statements regarding the Board's capacity to protect small cultivators falls short. In reality, it seems that the Initiative specifically precludes the Board of Supervisors from amending the Initiative for the purpose of helping small farmers. The Analysis correctly found that the Initiative's infirmities cannot be easily amended, and the Bundy Letter has done nothing to alleviate HCGA's serious concerns about the future of small farmers in Humboldt County.

* * *

Thank you for your consideration of the election law issues above. As you can see, the Bundy Letter misconstrues some of the issues presented to the County, and public employees and officials need to consider those issues carefully when determining how it may need to implement the Initiative. Once implemented, the Initiative cannot be amended or adjusted to protect small farmers, and will not be easily amended or adjusted in any respect, except by a vote of the People. Please let me know if you have any questions about the information contained in this letter.

Sincerely,



Nicholas L. Sanders

cc:
Kathy Hayes, Clerk of the Board
Scott A. Miles, Interim County Counsel

NLS
#1055