**25-8112**

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**CITY OF PERRIS**

*Defendant and Appellant,*

*v.*

**LAMAR CENTRAL OUTDOOR, LLC.**

*Plaintiff and Appellee.*

Appeal from United States District Court
Central District of California
Hon. Sunshine Suzanne Sykes
U.S. District Court Case No. 5:25-cv-02557-SSS-SP

## APPELLANT'S OPENING BRIEF

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## DISCLOSURE STATEMENT

In compliance with FRAP 26.1, Appellant states that it is a Governmental entity – an incorporated City – and that no further disclosures are required of it.

DATED: January 26, 2025

Respectfully submitted,

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## INTRODUCTION

## I. JURISDICTIONAL STATEMENT

The case was filed in September 2025 in the U.S. District Court for the Central District of California, invoking federal question jurisdiction based on two alleged violations of 42 U.S.C. Section 1983 (1996) and ancillary jurisdiction for a pendent claim for violation of the California Constitution. The District Court granted Appellee Lamar Central Outdoor, LLC a preliminary injunction by order dated December 19, 2025. This appeal is based on 28 U.S.C. section 1292(a)(1) (1948) and is proceeding pursuant to Circuit Rule 3-3. The appeal was filed on December 30, 2025, within eleven days of the Order granting the Preliminary Injunction dated December 19, 2025. (1-ER-3). It is timely pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A).

## II. ISSUES PRESENTED FOR REVIEW

The issues in this appeal by the City of Perris focus on the District Court's primary finding that the Appellee was likely to prevail on the merits of its claims of free commercial speech pursuant to the First Amendment of the U.S. Constitution. Those three interrelated issues are:

1. Whether a Court in evaluating if commercial speech on off-site billboards involves an "illegal activity" should apply federal law in determining whether the proposed advertising is protected speech under the First Amendment.

2. Whether, even if state law (California) permits the use and advertising of cannabis or marijuana for medical and commercial use, that state law is superseded or pre-empted by federal law, specifically the federal Controlled Substances Act, 21 U.S.C. Sec. 801, *et. seq*. (1970). The

Supreme Court's decision in *Gonzales v. Raich,* 545 U.S. 1, 125 S.Ct. 2195, 162 L. Ed.2d 1 (2005)upholding the application of federal law, specifically the Controlled Substances Act based on the Supremacy Clause forecloses the District Court's efforts to rely upon California state law in this case.

3. Whether even if state law were to be applied, does the proper construction of California Business and Professions Code Section 26152 (d) preclude such off-site commercial advertising on Interstate Highways, such as I-215.

## III. STATEMENT OF THE CASE

### A. Summary of Facts—General background

The City of Perris (City) is located in the Inland Empire area of Riverside County. It allows for previously registered cannabis dispensaries to market their products on their own sites and regulates them using its common police powers. (3-ER-341 [authenticating Ex. 12 to VOE filed in support of TRO/Preliminary Injunction]; 3-ER-576 [Ex. 12 of City Council meeting from 2021]).

Appellee Lamar Central Outdoor, LLC (Lamar) is an outdoor billboard advertising company. It owns and operates billboards for lease by others to advertise their goods or services. (3-ER-344, ¶3-¶4). Lamar typically has a single structure of a billboard that has two separate advertisements ("faces"), one on each side of the structure. (3-ER-344, ¶3).

As of 2025, Lamar had a total of 14 structures (28 faces) located along I-215. (3-ER-344, ¶4). Lamar had an additional 9 structures (18 faces) located within a one-mile radius of the City and within 660 feet of a freeway (presumably I-215). (Id.)

In July 2025, the City, initially acting through its Planning

Commission, began consideration of potential ordinances to regulate off-site advertising for cannabis products. (3-ER-417). The first proposal was in the form of a Zoning Code section that would amend in part Chapter 19.75 of the City's Municipal Code to preclude cannabis advertising on off-site freeway signs. (3-ER-417). Chapter 19.75 of the Municipal Code was not directed at cannabis dispensary owners per se, but rather municipal regulations of signs and billboards, including signs advertising cannabis. (3-ER-417).

In July 2025, the City Council was advised to consider a slightly broader proposal that would include the amendment to Chapter 19.75 (as initially suggested) but would also include amendments to Chapters 5.54 and 5.58 of the Municipal Code to directly address currently licensed dispensaries (both medical dispensaries – Chapter 5.54, and commercial operations—Chapter 5.58). (3-ER-383-384). As the City Council was advised by the Director of Development Services this proposed revised action to amend three total chapters in the Municipal Code came "in response to growing concerns about the impact of cannabis advertising on the City's image and community character." (3-ER-385).

**B. Summary of Facts—The Passage of the Two Ordinances**

In August 2025, the City Council held a second reading on two specific ordinances. Ordinance No. 1460 dealt with two amendments to the City's Zoning Code amending Chapters 5.54 and 5.58 that limited licensed cannabis dispensaries within the City from off-site advertising on freeways. (Stat. Add., Ex. A) Ordinance No. 1461 dealt with a separate amendment to the City's regulations of signs to preclude cannabis advertising on off-site freeway signs (billboards). (3-ER-424-425 [Agenda

Submittal item, for Item No. 10.K on the agenda]; (Stat. Add. Ex. B).[1]

The whereas clauses for Ordinance No. 1460 stated in pertinent part: ". . . the proliferation of cannabis advertisements along I-215 can reasonably create or add to a false public perception, particularly for people driving to, through or from the City on I-215, that the City has little to offer other than cannabis businesses, or that the City has an undue proliferation of cannabis businesses. . ."(3-ER-427-428). The next whereas clause in Ordinance 1460 also noted that cannabis remains illegal under federal law. (3-ER-428).

The City Council passed both Ordinance 1460 and Ordinance 1461 at the August 2025 hearing and they became effective 30 days thereafter, or on September 25, 2025. (3-ER-453-456). Official versions of both Ordinances are attached as part of the "Statutory Addendum" to this Opening Brief pursuant to Circuit Rule 28-2.7. (Stat. Add. at Exs. A-B). Ordinance 1460, which amended City Municipal Code provisions applicable to both medical and non-medical (commercial) uses of cannabis provided in essence that:

> "A medical marijuana [similar for commercial marijuana] dispensary permittee shall not advertise its City business or operation utilizing any off-premises advertising display on a sign or other structure, including but not limited to an offsite freeway sign or billboard (as those terms are used in Chapter 19.75 of this Code), that is located both: (i) within the City or within a one-mile radius

[1] The City Clerk has certified both ordinances, which are attached to the Statutory Addendum (Stat. Add.) Both ordinances contain on the last page of the ordinance a hyperlink to show corresponding changes in the City's Municipal Code. For simplicity, we have also attached in paper format those referenced hyperlinked pages in the Stat. Add.

> of the City's jurisdictional boundaries; and (ii) within 660 feet of the nearest edge of a freeway right-of-way line…"

Ordinance 1461 created a similar restriction for off-site signs by billboard owners or operators (such as Lamar).

Lamar, through legal counsel, submitted two letters strongly opposing the new Ordinances. On August 25, 2025, it submitted its first letter in opposition (3-ER-362-365). Then, in early September Lamar submitted its second letter opposing the Ordinances. (3-ER-358-359).

### C. Procedural History

Lamar filed its Complaint in the District Court the same day the two Ordinances were set to become effective—September 25, 2025. (3-ER-620). Within a week's time, Lamar then filed an *ex parte* application for a Temporary Restraining Order and a subsequent Preliminary Injunction. (2-ER-304). The District Court required a response, and after that response was filed, the District Court granted Plaintiff's TRO. (1-ER-25). The District Court's TRO is located at 1-ER-026-038.

The District Court then set a briefing schedule on Plaintiff's request for a Preliminary Injunction. (1-ER-038). While the original date for the hearing on the Preliminary Injunction was set for October 23, 2025 (1-ER-038), that hearing was continued until December 4, 2025.

The District Court then held a hearing on December 4, 2025 as to the Preliminary Injunction. A certified transcript of that hearing is available. (2-ER-044-078). The District Court took the matter under submission.

On December 19, 2025, the District Court issued an order granting a Preliminary Injunction against enforcement of both Ordinances. (1-ER-003-0024). The District Court's order not only ran in favor of Lamar and

against the City, but also extended to other unidentified entities – "any other person or entity that is engaged in lawful cannabis advertising." (1-ER-0024).

The City filed this timely appeal on December 30, 2025. (4-ER-637-661). To correct the case number and caption, the City filed an amended notice of appeal also on December 30, 2025. (4-ER-663-687).[2]

## IV. SUMMARY OF ARGUMENT

Appellee Lamar is a commercial entity that features billboard-type advertising (1-ER-03 ["Plaintiff is an outdoor billboard advertising company…"]). Lamar claims to a right of commercial speech under the First Amendment of the U.S. Constitution. The Supreme Court in *Central Hudson Gas & Elec. v. Public Svc. Comm'n*, 447 U.S. 557 (1980) (*Central Hudson*) set out a four-part test for evaluating whether governmental regulation of such commercial speech is consistent with the First Amendment. The first part of that four-part test focuses on the subject matter of the speech—whether it is related to either illegal activity or likely to mislead. *Id*. at 563-564 ["The government may ban… commercial speech related to illegal activity." (citation omitted)]. In this case, the sale or distribution of cannabis is illegal under federal law and therefore constitutes an "illegal activity" as that term was in *Central Hudson*. The City is therefore correct in regulating the advertisement of that illegal activity under two separate Ordinances.

Specifically, this case involves three separate but interrelated legal issues:

[2] The Amended Notice of Appeal only corrected an error in the case caption designation of the Magistrate Judge assigned to this case.

1. There is applicable federal law governing the particular activity about which commercial speech seeks to discuss, and declaring that activity illegal. Therefore, the federal law must apply and accordingly a government (even a local one) can ban speech concerning an illegal activity. (*Central Hudson*). This is particularly true in cases brought (as this one is) pursuant to 42 U.S.C. Sec. 1983, which applies federal law to actions taken under "color of state law."

2. The Supremacy Clause of the U.S. Constitution governs in cases where there is a conflict between federal law prohibiting cannabis under the Controlled Substances Act and state law allowing sales of cannabis for medical and certain adult commercial uses. *Gonzales v. Raich*, 545 U.S. 1 (2005) (*Gonzales)* and related subsequent cases control. In *Gonzales*, U.S. Drug Enforcement agents seized cannabis grown on a California farm despite the existence of California state law allowing the use of cannabis for medical purposes. The Supreme Court expressly invoked the Supremacy Clause and affirmed the seizure, which was challenged on Commerce Clause grounds. Subsequent cases, including the Fifth Circuit's decision in *Cocroft v. Graham,* 122 F.4th 176 (2024), *cert. denied*,145 S. Ct. 2682 (2025) (*Cocroft*), have confirmed the validity of the approach in *Gonzales*. There is indeed a "positive conflict" between federal law, the Controlled Substances Act, which makes the manufacture and distribution of cannabis (even on an intrastate basis) a federal offense, and California state law, which attempts to encourage the manufacture and distribution of cannabis on an intrastate basis.

3. Even if, *arguendo*, the determination of whether billboard advertising was an 'illegal activity' is considered under state law, then California's Business & Professions Code Section 26152, subpart (d)

prohibits advertising cannabis billboards located on "an interstate highway." The District Court's construction of this statute to limit it to only apply to an interstate highway that crosses the California border is incorrect as a matter of law. Given that the proposed commercial speech addresses an activity that is illegal under both federal and state law, the City of Perris could validly regulate that speech.

## V. ARGUMENT

### A. Issue 1—Federal Law Must Apply in Considering Whether Commercial Speech Involves an "Illegal Activity" that merits no protection of commercial speech under *Central Hudson*

#### 1. The Standard of Review

A district court's order granting a request for preliminary injunction is reviewed for abuse of discretion. *Idaho v. Coeur d'Alene Tribe,* 794 F.3d 1039, 1042 (9th Cir. 2015). A district court abuses its discretion if it "(1) applied incorrect substantive law or an incorrect preliminary injunction standard; (2) based the decision on a clearly erroneous finding of a material fact; or (3) applied an acceptable preliminary injunction standard in a manner that results in an abuse of discretion. *International Molders' and Allied Workers' Local Union No. 164 v. Nelson*, 799 F.2d 547, 550, and n. 1. (9th Cir. 1986).

In this case, the district court's interpretation of the underlying legal principles is "subject to de novo review." *Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 475. (9th Cir. 2022), *quoted in X Corp. v. Bonta*, 116 F.4th 888, 897 (9th Cir. 2024) ("We review the denial of a preliminary injunction for abuse of discretion, but we review de novo the underlying issues of law.")(*X Corp*.)

### 2. The District Court erred in determining that Lamar was likely to prevail on the merits of its First and Second Causes of Action for violation of 42 U.S.C. Sec. 1983 (Right of Free Speech)

A preliminary injunction can only be granted when the moving party established that: "(1) [it] is likely to succeed on the merits of [its] claim, (2) [it] is likely to suffer irreparable harm absent the preliminary injunction, (3) the balance of equities tip in [its] favor, and (4) a preliminary injunction is in the public interest." *X Corp.*, 116 F.4th at 897 (quoting *Baird v. Bonta*, 81 F.4th 1036,1040 (9th Cir. 2023)).

In this case, the District Court found that Lamar was likely to success on the merits of its claim. Lamar's first two causes of action are founded on 42 U.S.C. Section 1983. (3-ER-621, 629-633).[3] Despite this, the District Court found that Lamar was likely to succeed based on the application of *state* law governing cannabis use. This was error in at least two regards.

First, it needs little citation for the fundamental proposition that Section 1983 affords relief only for deprivation under color of state law of "any rights, privileges or immunities secured by the [federal] Constitution." It is also widely recognized that Section 1983 does *not* provide for violation of state law, even as to state constitutional claims. *See, e.g.*, *Baker v. McCollan*, 443 U.S. 137, 146 (1979)("… false

[3] Lamar's third cause of action is founded on California Constitutional law, which contains essentially the same provision for free speech, including commercial speech. [CITATION]The District Court omitted any separate discussion of this third cause of action in granting the preliminary injunction.

imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official"); *Armstong v. Asselin*, 734 F.3d 984, 989 (9th Cir. 2013) (violation of Alaska Constitution not actionable under § 1983).

In this case, however, the District Court determined that, for purposes of application of the First Amendment right to free speech for commercial billboards, it was *California state law* that determined the first prong of the *Central Hudson* test—i.e., whether a governmental regulator could regulate commercial speech because it related to an "illegal activity." (1-ER-11 ["… if medical and adult-use cannabis is legal under state law, so to must be the advertising of it under state law"]; 1-ER-13 ["In short, California's law can coexist with the CSA"]). For the District Court, however, the determination of whether cannabis marketing was "illegal" turned only on California state law, which generally allows for use of medical and certain commercial cannabis uses. (1-ER-11; 1-ER-15 ["… [T]he Court finds that the underlying conduct here is lawful for purposes of the first prong of the *Central Hudson* test"]).[4]

The District Court in evaluating the likelihood of Plaintiff's success on the merits never even mentioned Section 1983 or its requirement that a state law (in this case two ordinances) violate "federal law." Nor did the District Court directly address the "elephant in the room"—i.e., that

[4] As noted in Part V.C, *infra*, there is a compelling argument that a California statutory provision, Bus. & Prof. Code §26152(d), also bans this type of cannabis advertising. For simplicity, we follow the structure of the District Court's Order granting the preliminary injunction but note that that state statute is another grounds for overturning the Order.

federal law prohibits the marketing and distribution of cannabis. At best, the District Court in discussing the issue of the Supremacy of federal law concedes that: "[W]hile it is true that cannabis is illegal under federal law, it can also be true that medical and adult-use cannabis is legal under California state law." (1 ER-11). This, however, is more than a minor "truth"—Section 1983 requires one measure the allegedly offensive state law (such as an ordinance) against *federal law*. (42 U.S.C. § 1983; *West v. Atkins*, 487 U.S. 42 (1988) [defining elements of a claim under Section 1983]).

This is the unicorn of Section 1983 cases potentially likely to success on the merits—whether or not a city violates federal law turns on an issue of *state law*. Neither the District Court nor appellee below cited any such Section 1983 cases in which the alleged state actor was held liable based on a state (not federal) law determination.

**3. The District Court erroneously relied on a unique "Same Sovereign" Theory to espouse state law.**

In opposition to Plaintiff's Request for a Preliminary Injunction, Defendants cited the Fifth Circuit's reasoning in *Cocroft v. Graham*, 122 F.4th 176 (5th Cir. 2024), *cert. denied,* 145 S. Ct. 2682 (2025). The Fifth Circuit held that under the first prong of the *Central Hudson* federal law, specifically the Controlled Substances Act (CSA), determined whether the State of Mississippi's ban on medical cannabis precluding "advertising and marketing in any media, including but not limited to broadcast, electronic, and print media" (122 F.4th at 178) passed Constitutional muster. In that case, it was the plaintiffs urging a First Amendment violation who argued what the Fifth Circuit terms a "kind of same-sovereign theory"—i.e., that only the sovereign that enacted the law regulating the underlying conduct

has the power to enact laws restricting related commercial speech." (122 F.4th at 180).

The Fifth Circuit rejected this "same-sovereign theory as "unsupported by law." (Id.). Instead, the Fifth Circuit held the federal CSA governs "even in states with more permissive marijuana laws" and because the advertising of cannabis violates federal law the "First Amendment poses no obstacle to the state's commercial-speech regulation." (122 F.4th at 184).

The District Court criticized what it termed the Fifth Circuit's "rigid construction" (1-ER-9), and implicitly (if not explicitly) adopted the "same-sovereign" theory in this case. (1-ER-9-11). The District Court erred.

**(a) The "Same Sovereign" Theory Violates the Fundamental Assumption of the Supremacy Clause**

If read literally, the "same sovereign" theory would *preclude* the federal government from regulating either the substance or the advertising about any future product—If the state had already regulated it. That is, per the "same-sovereign" theory, only the original sovereign who regulated the underlying product has the legal power to regulate something related to commercial speech as to that product. As the Fifth Circuit put it: "The plaintiffs [urging a same sovereign theory] urge a reading that does not merely ask, "Is this product illegal" but instead inquires, "Has the jurisdiction that is banning this commercial speech first prohibited the commercial conduct it proposes." (*Cocroft*, *supra*, 122 F.4th at 180). This notion violates the Supremacy Clause and would effectively handicap the federal government from ever regulating commercial speech as long as "the state [sovereign] got there first." (U.S.

Const., Art. VI, cl.2 [The Constitution, valid treaties and valid federal laws "shall be the supreme law of the Land."]).

**(b) The Cases cited by the District Court for its adoption of the "same sovereign" theory are unpersuasive.**

The District Court cites five cases in support of its adoption of the "same sovereign" theory. None are persuasive. First, the District Court cited *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (plurality opin.) at 1-ER-9. That case dealt only with a Rhode Island statute limiting price advertising for alcoholic beverages. More critically, there was no contradictory federal statute to consider. Whether or not a state regulation (without an intervening federal statute) of commercial speech within its jurisdiction is valid is simply not on point. Indeed, the Fifth Circuit made this very point: "[T]he facts of *44 Liquormart* involved a state-level speech restriction related to transaction that were *legal* under both federal and state law; the identity of the sovereign regulating the commerce was not at issue." (*Cocroft, supra,* 122 F.4th at 181 (emphasis added)).

Second, the District Court cites an Eight Circuit case, *Casbah, Inc. v. Thone*, 651 F.2d 551, 564 (8th Cir. 1981) *(Casbah)*. (1-ER-9). Once again, the District Court's application of *Casbash* to the present case is misplaced. *Casbah* recognized that a state may regulate commercial speech related to conduct (sales of drug paraphernalia) *if* the manufacturing, use and sale of which was already illegal under that state's (Nebraska's) law. (*Casbah, supra* at 555 [describing Nebraska statute]). The same statute also provided limits on advertising (in Nebraska) of such materials. (Id. at 563). The Court of Appeal in that case

did state that "advertising promoting the sale of drug paraphernalia encourages activities which are otherwise crimes under Nebraska law." (Id. at 564). But, the Eighth Circuit said nothing about "sole sovereign" or that doctrine in any manner. Moreover, there was again nothing in that case that dealt with any conflict or claimed conflict with federal drug regulations. Simply put, *Casbah* does not support the proposition, as the District Court implied, that a state can regulate speech concerning conduct that is illegal under federal law.

Third, District Court cites to *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). (1-ER-9). In that case, decided before *Central Hudson,* the Supreme Court struck down a ban on abortion-related advertisements in Virginia, but only as applied to plaintiff's advertising of abortion services in New York, where abortion was legal. (421 U.S. at 828-829). The Supreme Court found that Virginia could only regulate advertising offering abortion-related services within its borders, but not in another state. (*Id*. at 827). Again, the District Court's reliance on this case is irrelevant to the present issue. *Bigelow* involved two separate jurisdictions with one state (Virginia) attempting to impose their laws onto another state (New York). That is not (as the District Court seeks to imply) some sort of "single sovereign" ruling; rather it is a common sense ruling that a state may only regulate within its own jurisdictional boundaries, and not elsewhere. As the Fifth Circuit explained in *Cocroft*, marijuana transactions "are illegal in every state by virtue of federal law" so no commercial speech proposing such transactions "concern[s] lawful activity." (*Cocroft*, 122 F.4th at 180, quoting *Central Hudson*, 447 U.S. at 566).

Fourth, the District Court cites to a First Circuit case related to a First Amendment challenge to a New Hampshire statute making it

illegal to place drug paraphernalia advertisements outside of the state, even if the sale of drug paraphernalia was legal in other states. (1-ER-9-10, citing to *New England Accessories Trade Ass'n, v. City of Nashua*, 679 F.2d 1, 3 (1st Cir. 1982)). The court held that drug paraphernalia advertising did not receive First Amendment protections because it promoted ingestion of drugs, which was "criminal in all jurisdictions." (*Id.*) Despite this ruling, the District Court placed heavy reliance on a footnote which is pure *dicta*. within the same case which states that "[i]f New York, or some other state, decided to legalize the sale and use of marijuana, New Hampshire would have greater difficulty… prohibiting an advertisement" related to marijuana. (*Id.* at 4.) The District Court's reliance on speculation related to drug legalization is dicta, not law.

Finally, the District Court references the Ninth Circuit's holding in *Washington Mercantile Association v. Williams*, 733 F.2d 687, 691 (9th Cir. 1984) (*Washington Mercantile).* (1-ER-10). In that case this Court held that: "[s]ale or delivery of drug paraphernalia is illegal in Washington, so advertisements for sales in or mail orders from Washington are unprotected speech." Then came the dicta. The Ninth Circuit then suggested a fact pattern not presented in the case, writing in pure dicta: "In contrast, the advertiser who proposes a transaction *in a state where the transaction is legal is promoting a legal activity. Its speech deserves First Amendment protection*." (1-ER-10 (emphasis added by District Court) citing to *Washington Mercantile*, 733 F.2d at 691).

The District Court infers from this dicta that it is tantamount to a holding of the Court, and suggests that this Court "reinforced the implication [that courts would extend First Amendment protection to advertising for advertising for activities that are legal in the state where

the transaction would occur." (1-ER-10). As Justice Gorsuch recently observed as to dicta:

> Dicta might also provide future courts with a source of "thoughtful advice." Ibid. But future courts had to be careful not to treat every "hasty expression ... as a serious and deliberate opinion." *Steel v. Houghton*, 1 Bl. H. 51, 53, 126 Eng. Rep. 32, 33 (C. P. 1788). To do so would work an "injustice to [the] memory" of their predecessors who could not expect judicial remarks issued in one context to apply perfectly in others, perhaps especially ones they could not foresee. Ibid. Also, the limits of the adversarial process, a distinctive feature of English law, had to be borne in mind. When a single judge or a small panel reached a decision in a case, they did so based on the factual record and legal arguments the parties at hand have chosen to develop. Attuned to those constraints, future judges had to proceed with an open mind to the possibility that different facts and different legal arguments might dictate different outcomes in later disputes. *See Duxbury* 19–24.

*Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) (Gorsuch, J., concurring)

Moreover, the Fifth Circuit, in *Cocroft*, distinguished *Washington Mercantile*, as involving conflicting laws between "different states" and not a conflict between state and federal law. (*Cocroft*, 122 F.4th at 182).

The District Court, however, incorrectly concluded that *Cocroft*'s conclusion should be disregarded as it: "improperly severs the connection between the underlying conduct to the speech and the identity of the sovereign that is regulating commercial speech related to said conduct, running contrary to the Supreme Court's articulation of this principle in *Bigelow* and *44 Liquormart* and the lower courts' interpretation of this principle." (1-ER-10). With respect, the Fifth Circuit has an exact

opposition interpretation, and the other cases cited by the District Court do *not* even mention the words "same-sovereign" and are inapposite for all the reasons stated above. The District Court erred.

Therefore, the "same-sovereign" theory is relevant, if at all, to address conflicts of law between states, not conflicts of law between states and the federal government. *Central Hudson* does not ask which sovereign criminalized the conduct. It only asks whether the speech concerns lawful activity. This inquiry rests on whether the underlying conduct is lawful under governing law, not whether the same sovereign that bans the speech also bans the conduct. Nothing in the cases cited by the District Court conditions the "unlawful activity" prong of *Central Hudson* on the "identity" of the sovereign.

**4. The "Ultimate" Sovereign—the Federal Government—Has Declared Cannabis marketing and distribution to be an illegal activity**

This Court restated the basic statutory interpretation of the CSA as applied to the legality of cannabis this very year:

> Under the federal Controlled Substances Act (CSA), it is unlawful to 'manufacture, distribute, or dispense or possess with intent to manufacture, distribute, or dispense a controlled substance,' including marijuana. 21 U.S.C. § 841(a)(1); *see* 21 U.S.C. § 812(c)(classifying marijuana as a Schedule I substance.[5]

[5] The President directed the Department of Justice to consider revising the CSA listing for cannabis from a Schedule I category to a Schedule III category. Executive Order No. 14,370, 90 Fed. Reg. 60541 (Dec. 23, 2025). As of this writing, the Department of Justice has not announced a final decision on the proposed revision, which, in any event, does not impact the conclusion that cannabis remains illegal. *Peridot* at *2 (Noting the

*Peridot Tree WA, Inc. v. Washington State Liquor and Cannabis Control Bd.* ,___F.4th___, Nos. 24-2681 and 24-7196, 2026 WL 17170 at *2 (9th Cir. Jan. 2, 2026)(*Peridot).*

Although *Peridot* was decided after the District Court's ruling (1-ER-3), it decides no new legal principal unknown to this Court or the District Court. *See Patients Mut. Assistance Collective Corp. v. Comm'r of Internal Revenue*, 995 F.3d 671, 674 (9th Cir. 2021); *accord, Gonzales* 545 U.S. at 14 ("In enacting the CSA, Congress classified marijuana as a Schedule I drug. 21 U.S.C. § 812(c). . .Schedule I drugs are categorized as such because of their high potential for abuse. . lack of any accepted medical use…").

**B. Issue 2—The Federal Constitution's Supremacy Clause Applies to a Determination of Cannabis' Legal Activity**

The District Court apparently adopted the "sole sovereign" doctrine to distinguish this case from the Fifth Circuit decision in *Cocroft*. (1-ER-009-11). That part of its work done, the lower court switches from that doctrine to the "dual sovereign" doctrine in order to avoid the federal Supremacy Clause. (1-ER-11 ["The United States is a dual-sovereign system…"]). This type of "sole", but now yet still "dual-sovereign" approach calls to mind the rock-and-roll Steely Dan album, "Pretzel Logic."[6]

As best one can diagram it, the lower court's logic appears to be:

1. States can control cannabis advertising under the "sole sovereign" doctrine;

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Executive Order and concluding: "Nevertheless, at this time, marijuana remains illegal under the CSA.")

[6] The album was released in 1974 by Steely Dan.

2. When challenged with a federal Supremacy Clause, states still win because of the "dual sovereign" doctrine.

3. Therefore, state law controls whether under the First Amendment the sale and marketing (via advertisements) of cannabis.

This is simply not a reasonable or even a plausible construction of the federal Constitution's Supremacy Clause. The Supreme Court has so held.

### 1. The U.S. Supreme Court Held 20 Years Ago that the Supremacy Clause Overrides California's then Regulation of Medical Cannabis

Some twenty years ago the U.S. Supreme Court considered a clash between California's allowance of cannabis use for medical applications and the CSA. Federal law, the CSA, won. Pertinent sections of the CSA, including Section 801 and Section 841, are attached. (Stat. Add. at Ex. C.).

In *Gonzales*, several California residents obtained marijuana under that state's Compassion Use Act allowing for medical use of cannabis. One, Ms. Monson, cultivated her own cannabis. Another California resident, Ms. Raich, relied upon others to provide her locally grown cannabis free of charge. *Gonzales* 545 U.S. at 7. Federal Drug Enforcement Agents (DEA), together with county sheriffs investigated Monson's home. Although the County officials deemed that her use was lawful under California law, the DEA agents seized and destroyed all six of Monson's cannabis plants. *Id.* Monson and Raich sought a preliminary injunction against the DEA and the U.S. Attorney General (Gonzales), claiming that enforcement of the CSA against them would violate the Commerce Clause, the Due Process Clause, and other constitutional provisions. *Id.* at 8.

As the High Court framed the issue, it was not the wisdom of enforcing the CSA statute, but rather "whether Congress' power to regulate interstate markets for medical substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally." *Id.* at 9. There was, however, a second issue debated and thoroughly discussed by the Court and the dissenters in *Gonzales*—whether the state was merely exercising its inherent powers under "our federalist system of government", which, per the dissenters, allowed "a single courageous State" to serve as a "laboratory" to "try novel social and economic experiments." *Gonzales* at 42 (O'Connor, with whom Rehnquist, CJ, and Thomas JJ join, dissenting). For the dissent, this issue involved a type of dual sovereign issue – "The States' core police powers… to define criminal law and to protect health, safety and welfare of their citizens." *Id.*.[7]

It is this second issue, discussed and decided in *Gonzales*, that is critical to this case. The majority stated that the Supremacy Clause applied, and in no uncertain terms:

> Second, limiting the activity to marijuana possession and cultivation "in accordance with state law" cannot serve to place respondents' activities beyond congressional reach. *The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.* It is beyond peradventure that federal power over commerce is " 'superior to that of the States to provide for the welfare or necessities of their inhabitants,'

[7] The Court in *Gonzales* did not use the term "dual sovereignty" in this discussion, but it clearly did consider the issue as to whether a separate state could, notwithstanding federal law to the contrary, regulate cannabis within its own jurisdiction.

" however legitimate or dire those necessities may be.

*Gonzales* at 29 (emphasis added).

The majority, in an opinion authored by Justice Stevens, went further in an immediately succeeding footnote to reject the dissenting argument (principally that of Justice Thomas) that a subsequent state law issued under its sovereign "police powers" might somehow supersede federal law (the CSA). As the majority put it—this variation of a type of dual sovereignty urged by the dissenters—even assuming strict state law controls over cannabis – was not constitutionally tenable:

> This is so even if California's current controls… are 'effective,' as the dissenters would have us blindly presume [internal citation omitted]. California's decision… to impose 'stric[t] controls" on the cultivation and possession of marijuana for medical purposes [internal citation omitted] cannot retroactively divest Congress of its authority under the Commerce Clause. Indeed, Justice THOMAS' urgings to the contrary would turn the Supremacy Clause on its head, and would resurrect limits on congressional power that have long since been rejected.

*Gonzales* at 29, n.38

This reading of *Gonzales* is the exact same reading that the Fifth Circuit arrived at two years ago. As the Fifth Circuit held:

> The Supreme Court confirmed in *Gonzales v. Raich* that the CSA is a valid exercise of Congress's power under the Commerce Clause, and it held that the Supremacy Clause "unambiguously provides" that the federal CSA governs even in states with more permissive marihuana laws.8 Marihuana is illegal in every United States jurisdiction, "any Thing in the ... Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Because marihuana is not a "lawful activity" in

> Mississippi, the First Amendment poses no obstacle to the state's commercial-speech restrictions.

*Cocroft* at 184 (n. 8 omitted)

**2. The Trial Court's Effort to Distinguish *Gonzales* fails**

The District Court stated that the Fifth Circuit's (and appellant's) reliance on *Gonzales* was "misplaced" stating that *Raich* did not declare that the CSA rendered state marijuana laws "invalid" and reasoning that this is not what the Supremacy Clause "requires." (1-ER-12). First, the lower court simply omits any consideration of the facts in *Gonzales*—that federal DEA agents took cannabis plants despite state law stating that growing such crops for medical purposes was proper. If this is not a determination that the then California law (its Compassionate Use Act) was invalid as against federal law then it is hard to conceive of what it did determine.

Second, the District Court does not discuss let alone analyze the complete rationale of the Fifth Circuit which held that: "There are well-settled *First Amendment* principles that implicate the Supremacy Clause in this case. Those principles permit states to ban commercial speech about activities that are not 'lawful.' (*Central Hudson*, 447 U.S. at 566, 100 S.Ct. 2343). And the Supremacy Clause defines what is 'lawful' where a valid federal law is involved. U.S. CONST. art. VI, cl.2". (*Cocroft* at 184).

Third, the District Court does not discuss or analyze decisions in this Court about the direct and ineluctable effect of the Supremacy Clause on state laws purporting to "legalize" cannabis. As this Court wrote in *United States v. McIntosh,* 833 F.3d 1163,1179 n.5 (9th Cir. 2016): "Nor does any state law 'legalize' possession, distribution, or

manufacture of marijuana. Under the Supremacy Clause of the Constitution, state laws cannot permit what federal law prohibits. U.S. Const. art VI, cl. 2. Thus, while the CSA remains in effect, states cannot actually authorize the manufacture, distribution, or possession of marijuana. Such activity remains prohibited by federal law."

Fourth, this Court recently reinforced the basic premise that whatever current level of federal enforcement of cannabis exists it is the statutory provision of the CSA, not federal enforcement, that controls: "[I]n our constitutional order it's Congress that passes laws, Congress that saw fit to enact 21 U.S.C. § 841, and Congress that in § 841 made the distribution of marijuana a federal crime." (*Peridot* at *6 [quoting *Feinberg v. C.I.R.,* 808 F.3d 813,816 (10th Cir. 2015)(Gorsuch, J.)])

Congress has made the distribution of cannabis a federal offense—an "illegal activity." The District Court erred when it ignored clear federal law and instead, based on an ill-founded application of dual sovereignty, elected to rely upon state law. This is particularly apparent in a case plead under Section 1983, which measures a state ordinance against *federal* law.

Similarly, in *Doe v. Dynamic Physical Therapy, LLC*, No. 25-180, 607 U.S. ___, ___ S. Ct. ____, 2025 WL 3506945 (Dec. 8, 2025) (*per curiam)* the Supreme Court considered whether a Louisiana state law which immunizes health care providers from civil liability during public emergencies barred Plaintiff's federal claims for liability against one such emergency provider. The Supreme Court acknowledged that while Louisiana may immunize healthcare providers from civil liability under state law, the state statute "has no power to confer immunity from federal causes of action." (*Id.* at *1). As the Court wrote

> Defining the scope of liability under state law is the State's prerogative. But a State has no power to confer immunity from federal causes of action. *See, e.g.*, *Howlett v. Rose*, 496 U.S. 356, 383, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990); *Haywood v. Drown*, 556 U.S. 729, 740, 129 S.Ct. 2108, 173 L.Ed.2d 920 (2009); *Williams v. Reed*, 604 U.S. 168, 174, 145 S.Ct. 465, 221 L.Ed.2d 44 (2025). "[T]he Judges in every State" are bound to follow federal law, "any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U. S. Const., Art. VI, cl. 2.

*Doe* at *1.

In this case, Appellee Lamar and the lower court would have this Court ignore well-settled federal law. Instead, select a contrary state law for determining whether the conduct in question is an "illegal activity" under *Central Hudson*. This violates the essence of the Supremacy Clause.

The District Court's selection of state law in the face of opposing federal law also threatens to Balkanize the First Amendment commercial speech standard. For example, within this Circuit, commercial speech advertising cannabis might be illegal in states such as Alaska, Idaho and Montana, but (per the lower court) such commercial presentations would be legal in states such as Arizona, California, and Oregon. This type of "pick your state" to determine the applicability of the First Amendment is unprecedented and unwise.

### 3. Cannabis marketing is illegal on the federal level and legal in California—that is a "Positive Conflict" that establishes Pre-emption

The District Court correctly observes that preemption analysis should consider the words of the federal statute, the CSA. As Judge Sykes

noted, the CSA has a preemption provision that provides in pertinent part that the CSA will not pre-empt state law "unless there is a *positive* conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together: (1-ER-12 [citing to 21 U.S.C. § 903 (1970) (with District Court's emphasis)]). [8]

The District Court, however, then quickly concludes that "compliance with both laws is not impossible and that California's law does not "obstruct the objectives" of Congress. (1-ER-12). It errs and substantially so.

As to a "positive conflict" the CSA makes the marketing and distribution of cannabis illegal. 21 U.S.C. § 841(a)(1) (2025); *Peridot* at *2. As this Court noted this year, this classification of the CSA as to cannabis reflects a Congressional objective and determination about a "high potential for abuse, lack of any acceptable medical use, and absence of any accepted safety for use in medically supervised treatment." *Peridot* at *2 [quoting *Gonzales v. Raich*, 545 U.S. 1, 14, 125 S.Ct. 2195,162 L.Ed. 2d 1 (2005)].

California state law, now termed the Medicinal and Adult-Use Cannabis Regulation and Safety Act, is to the direct opposite effect: The marketing and distribution of cannabis, although regulated, is legal and effectively encouraged Cal. Bus. & Prof. Code § 26000(b) (declaring statutory intent to effectuate the regulation of cannabis, including its

[8] The full text of 21 U.S.C. Section 903 reads: "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together."

manufacturing, distribution and sale). *See Peridot Tree, Inc. v. City of Sacramento*, 94 F.4 916, 921 (2024). (1-ER-4 [noting "the City does allow cannabis businesses to lawfully operate in the City…"]).

For this District Court, a federal statute making the very same act "illegal" compared with a state law that renders it "legal" is not a "positive conflict." (1-ER-12). Rather, per the lower court, California's law simply "removes state-level penalties" for medical and adult uses of cannabis. (1-ER-12). Not quite true. Congressional (federal) intent was to stop the marketing of cannabis. California's state law does the opposite – it encourages the marketing of cannabis.

To suggest that California's law only "removes" state-level penalties is to disregard the very textual introduction to that law. California's Business & Professions Code § 26000, the introductory section to the law commonly referred to as the "Medical and Adult-Use Cannabis Regulation and Safety Act", proclaims a far broader purpose than just limiting state law liability. It states in subpart (b) that:

> The purpose and intent of this division is to establish a comprehensive system to control and regulate the cultivation, *distribution, transport, storage, manufacturing, processing, and sale of* both of the following:
>
> > (1) Medicinal cannabis and medicinal cannabis products for patients with valid physician's recommendations.
> >
> > (2) Adult-use cannabis and adult-use cannabis products for adults 21 years of age and over and cannabis products intended for use on, or consumption by, animals.

(Cal. Bus. & Prof. Code § 26000(b)).

As this Court has noted in a separate case involving CSA

preemption, the question of whether a particular state law poses a "sufficient obstacle" to the federal statute is "informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Oregon Prescription Drug Monitoring Program v. U.S. Drug Enforcement Administration*, 860 F.3d 1228, 1236 (9th Cir. 2017); *accord United States v. Zadeh*, 820 F.3d 746, 750-52 (5th Cir. 2016). In both of those cases, the courts found that provisions of state law conflicted with the provisions of the CSA.

In the case of the CSA, Congress spelled out its specific concerns in the opening section of the Act.[9] Congress determined that the "illegal" importation, manufacture, distribution and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." (21 U.S.C. § 801 (2)). Congress further found that: "Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributer interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate." (21 U.S.C. § 801(5)). Therefore, Congress found that: "Federal control of intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." 21 U.S.C. § 801(6); *see Gonzales* at 12, n.20 (reciting all findings from Section 801). As the Supreme Court noted: "To effectuate these goals, Congress devised a closed regulatory system

[9] The structure of the CSA and prior related drug enforcement laws is detailed in *Gonzales* at 10-13.

making it unlawful to manufacture, distribute, dispense or possession any controlled substances except in a manner authorized by the CSA. *Gonzales* at p.13 (citing to 21 U.S.C. §§ 841(a)(1), 844(a).

Given this extensive regulatory structure, one which intentionally regulate *intrastate* manufacture and distribution as something that was virtually indistinguishable from *interstate* manufacture and distribution, it is beyond peradventure that Congress both intended to reach local (including California) distribution of cannabis. Moreover, after *Gonzales* it cannot be credibly argued that Congress exceeded its constitutional powers.

This constitutes a "positive conflict" between federal law and state (California) law. The District Court's citation to a 1947 case, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) cited at 1-ER-13, remarkably ignores the express Congressional purposes in the CSA statute created decades later and the subsequent affirmation of those goals by the Supreme Court in *Gonzales*.

Likewise, the District Court's anti-commandeering argument is misplaced. The District Court asserts that a state law does not "stand as an obstacle" to federal law merely because it does not enforce it, as doing so would violate the anti-commandeering doctrine, citing to *New York v. United States*, 505 U.S. 144, 166 (1992). (1-ER-13). However, Appellant is not contending that California state authorities must criminalize marijuana pursuant to federal law nor is Appellant contending that federal law compels California to repeal state law. California's cannabis laws only serve to inform individuals within the state that those who use marijuana in accordance with their regulations are not subject to state-level penalties. This does not affect, however, the fact that cannabis manufacturing and distribution is illegal under federal law.

So long as Congress has criminalized marijuana, advertising that promotes marijuana transactions does not concern lawful activity for purposes of the *Central Hudson* test.

**4. The District Court's newly minted doctrine of an "Illegality Inquiry" Never Before Articulated Merits a Quick Demise**

Perhaps implicitly recognizing the weakness of its position that federal law somehow does not make cannabis illegal and that state law should determine the issue in a Section 1983 case, the District Court uses the "necessity is the mother of invention" approach. It cobbles together a new interpretation of what it means to be "illegal" for purposes of the First Amendment and then goes so far to as suggest that mere "legal technicality" about an illegal activity should not overcome what it terms "economic realities." (1-ER14-15). For this invention, the District Court cobbles together some isolated concurring opinions of Justice Blackmun (1-ER-14) together with citation to cases decided before the seminal decision in *Central Hudson*. (1-ER-14). It then cites to a Congressional statute in 2024, claiming that this statute somehow reflects a congressional policy that "states should make their own medical marijuana laws." (1-ER-14).

The District Court's novel interpretation of *Central Hudson* and construction of a federal appropriations bill from 2024 fail, even when clothed with the new "illegality inquiry" camouflage.

First, consider what Justice Powell, writing for the majority of the Court in 1980 actually said in the controlling opinion. Justice Powell noted that: "The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."

(*Central Hudson* at 562-563). Writing for the majority, he then stated: "Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of… commercial speech related to illegal activity." (*Central Hudson* at 563-564).

Unlike the District Court, the majority opinion in *Central Hudson* did *not* fashion a framework in which, even if commercial speech related to an illegal activity, you still made further inquiry. That was that, per the majority in *Central Hudson*. To be sure, Justice Blackmun concurred in the judgment, but he separately wrote that he disagreed with the majority's four-part test in his concurring judgment. (*Central Hudson* at 573 [Blackmun J., with whom Stevens, JJ. joins, concurring in judgment]).

The District Court's reliance on Justice Blackmun's concurrences in that and other cases is simply misplaced. He departed from the majority in *Central Hudson* and the lower court cites no case after *Central Hudson* in which the four-part test was later repudiated by a majority of a subsequent High Court.

The District Court then chastises the Fifth Circuit for what the lower court terms a "counterproductive and counterintuitive" opinion, allegedly ascribing to that Circuit an emphasizes on cannabis' "technical" federal illegality. To summon support for this interpretation out of the vapors, the District Court cites to a Congressional limitation on use of DOJ funds as to states that have *medical* cannabis laws. (1-ER-14 [citing to Pub. L. No. 118-42, § 531, 138 Stat. 25, 174]).

This Court this year rejected that analysis. At this Court held: "The mixed signals that the federal government has sent about marijuana

legalization at the state level do not change our calculus. It is true that Congress has used its power of the purse to limit DOJ interference with state medical marijuana regimes [citing the same statute]… But our assessment of the dormant Commerce Clause's reach cannot turn on how much the political branches still believe in the laws that are on the books." (*Peridot* *8).

Finally, in *Village of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, the Supreme Court upheld an ordinance regulating the sale of items displayed in close proximity to literature "encouraging illegal use of cannabis or illegal drugs..." *Village of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 496 (1982). The Supreme Court held that although the ordinance may limit the manner in which information is communicated, "[t]he ordinance is expressly directed at commercial activity promoting or encouraging *illegal drug use*. If that activity is deemed 'speech,' then it is speech proposing an *illegal transaction*, which a government may regulate or ban entirely." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 496 (emphasis added). As noted in these Supreme Court cases, commercial speech is not afforded constitutional protection when illegal conduct is being advertised despite consumer demand for such speech or informational value.

### C. Issue 3-Even Under California State Law Billboard Advertising Of Cannabis On Interstate Highways Is An Illegal Activity

As the District Court acknowledges, California law regulating the cannabis industry contains specific limits on advertising that substance. (1-ER-19). In particular, Section 26152 of the California Business & Professions Code states in subpart (d):

"A person engaged in commercial cannabis activity, whether licensed or unlicensed, shall not do any of the following:

…

(d) Advertise or market on a billboard or similar advertising device located on an interstate highway or on a state highway which crosses the California border."

(Cal. Bus. & Prof. Code §26152 (d) (2026) (Statutory Addendum Ex. D).

This provision clearly makes it illegal to advertise cannabis on a billboard "located on an interstate highway." Appellee and the District Court proffer a more limited meaning to this state statute, interpreting it to effectively limit billboards advertising cannabis but only if they are located "on an interstate highway… *which crosses the California border.*" (1-ER-23 [stating District Court conclusion]).

All agree that appellee's billboards are located on an Interstate Highway, I-215. (1-ER-3 ("Its [Lamar's] billboards in the City are located along the I-215 highway. [citation omitted]")). The District Court also agrees that California defines an "interstate" highway as "any highway at any time officially designated as a part of the national system of interstate and defense highways by appropriate authority of the federal government." (1-ER-22 [citing Cl. St. Hwy Code § 746 (h)]).

Thus, if state law is read as prohibiting billboard advertising of cannabis "on an interstate highway", then such advertisement is illegal under California state law, and is afforded no constitutional protection under *Central Hudson*—because, even under state law, the activity is an illegal one. If, on the other hand, Section 26152 (d) is construed only to apply to an Interstate… "which crosses the California border", then California state law does not prohibit cannabis advertising on I-215.

**1. The Statutory Text is in the Disjunctive—"Or"**

As the District Court correctly noted, one starts with the text itself of the statute to be construed. (1-ER-19 [citing authorities]). In this case, the statute is phrased in the disjunctive, with the pertinent portion banning billboard advertising of cannabis: "on a billboard or similar advertising device located on an interstate highway *or* on a state highway which crosses the California border." (Sec. 26152(d)(emphasis added)).

The term "or" is a disjunctive, not a conjunctive term. *See, e.g., Campos-Chaves v. Garland* 602 U.S. 447, 457 (1993) ("The word 'or' is 'almost always disjunctive, [citations omitted] and is generally used 'to indicate an alternative, Webster's Third New International Dictionary 1585); *United States v. Nishiie*, 996 F.ed 1013, 1022 (9th Cir. 2021)("As a general rule, the use of a disjunctive in a statute indicates alternatives and requires that they be treated separately." *Azure v. Morton*, 514 F.2d 897, 900 (9th Cir. 1975).

The District Court does not address this disjunctive term in its analysis of the statute.

**2. The History of Subdivision (d) confirms that the term "on a" was ADDED to the original statutory provision**

The District Court addresses in part the legislative history, but it ignores the legislative history specific to subdivision 26152 (d). (1-ER-21-22). Rather, the District Court relied upon generic statement of purpose in a 2017 general amendment to infer legislative intent as to this subdivision. (1-ER-21-22). That reliance ignores specific changes to this subpart.

In *2016* the voters approved Proposition 64. As originally adopted, the language of what was then Section 26152 (d) provided:

> "No licensee shall:
>
> * * * *
>
> (d) Advertise or market on a billboard or similar advertising device located on an Interstate Highway or State Highway which crosses the border of any other state.

Then, in a subsequent amendment in 2017, the Legislature in SB 94 added two critical words "on a":

> "A licensee shall not do any of the following:
>
> * * * *
>
> (d) Advertise or market on a billboard of similar advertising device located on an Interstate Highway or ***on a*** State Highway which crosses the ***California*** border." [emphasis showing amended language]
>
> (2-ER-205 (description of changes in pleadings to District Court); 2-ER-225 (language showing SB 94 amendment to this subpart)

The addition of the words "on a" further reinforces the inference that what the Legislature intended was two separate and distinct options: either "on an Interstate Highway" or "on a State Highway which crosses the California border."

The District Court in discussing the legislative history discussed this same bill, SB 94, and cited to a generic statement of purpose of the California Legislature. (1-ER-21 [citing to SB 94, §1 (Cal. 2017)]). This generic statement, however, does not alter the more specific legislative revisions to the specific subpart 26152 (d).[10]

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[10] The District Court's quotation of this generic goal inserts a bracketed phrase as to the second sentence: "The intent of Proposition 64 ***[and hence section 26152]*** and MCRSA was to ensure a comprehensive regulatory system…" (1-ER-21-22 (emphasis added)). The source

### 3. The District Court's reliance upon a single "canon of construction" to avoid the statutory language and legislative history is misplaced

The District Court's statutory analysis ultimately turned on its application of two "canons of construction", only one of which, the "series qualifier canon" supported that court's interpretation of the California statute. (1-ER-19-20 [discussing "series qualifier" cannon]). The District Court relied upon an Eleventh Circuit decision, *ECB USA, Inc. v. Chubb Ins. Co. of New Jersey*, 113 F.4th 1312, 1322 (11th Cir. 2024), *cert. denied*, ___ U.S. ___, 145 S.Ct. 1431 (2025) (*ECB*). That Circuit Court case in turn quotes from a textbook authored by Justice Scalia and Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 147 (2012) ("Scalia & Garner"). (1-ER-20).

The District Court, however, was faced with a common problem in

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material cited by the District Court, an excerpt from the 2017 statutory source shows *no* such bracketing. Instead, Section 1 subpart d of SB 94 in 2017 reads solely as: "(d) Although California has chosen to legalize the cultivation, distribution, and use of cannabis, it remains an illegal Schedule I controlled substance under federal law. The intent of Proposition 64 and MCRSA was to ensure a comprehensive regulatory system that takes production and sales of cannabis away from an illegal market and curtails the illegal diversion of cannabis from California into other states or countries." Other subparts of SB 94 made express modifications more pertinent to this case, including the specific amendment of what was then Section 26152 to add a new subpart (d) – that: "d) Advertise or market on a billboard or similar advertising device located on an Interstate Highway or on a State Highway which crosses the California border." (SB 94 §86 (Cal. 2017) (amending prior version of 26152 to add this new subpart)). The District Court did not discuss the legislative history, if any, supporting SB 94, section 86.

utilizing canons of construction—one in which one canon suggests one outcome and the other canon suggests a contrary reading of the statute. *See Circuit City Stores v. Adams*, 532 U.S. 105, 115 (2001) ("Canons of construction need not be conclusive and are often countered, of course, by some maxim pointing in a different direction."); *see* Scalia & Garner, supra at 150 (discussing "series qualifier" canon—"And like all the other canons (and perhaps more than most), it is subject to defeasance by other canons."); *ECB* at 1323 ("Indeed, we have explained that 'the canons are not rules of interpretation in any strict sense. [citation omitted]. They are just rules of thumb that reflect grammatical presumptions.").

In this case, the canon of a "series construction" is contradicted by a separate canon of "last antecedent or referent." Yet, the District Court's analysis leans heavily on the "series qualifier" canon—one which favored the Plaintiff. That was error.

The District Court relied principally on the "series-qualifier" canon, which Scalia and Garner described as: "when there is a straightforward, parallel construction that involves all nouns or verbs in a series,' a modifier at the end of the list 'normally applies to the entire series.'" (1-ER-19-20). First, this was not a series of nouns ("Interstate Highway *and* State Highways") that were linked together as part of a series. Rather, it was two separate nouns separated by a disjunctive term "or." The District Court *assumed* that the phrase "located on an interstate highway or on a state highway" was an "integrated clause" and therefore the modifier "which crosses the California border" applied both to the term "State Highway" and "Interstate Highway." That is an incorrect application of the "series-qualifier" canon.

Then, the District Court considered a second canon, which it termed

the "last-antecedent and nearest-reasonable-referent" canon. That canon, which holds that a conjunctive phrase, such as "which cross the California border" only modifies the last antecedent—in this case "State Highway." Thus, this canon reaches the opposite inferential position about the California statute – i.e., that "it is also reasonable to interpret the qualifying phrase 'which crosses the California border" to only be modifying the nearest referent, 'state highway.' (1-ER-21).

The District Court ended its analysis by concluding that application of the two canons and the text, punctuation and structure of the statute yielded only a "slightly persuasive argument in favor of applying the series-qualifier canon to interpret Section 26152 (d)." (1-ER-21). It did so despite the cautions of Scalia and Gardner in their text about the series-qualifier canon:

> Perhaps more than most of the other canons, this one [series-qualifier] is highly sensitive to context. Often the sense of the matter prevails: *He went forth and wept bitterly* does not suggest he went forth bitterly. And like all the other canons (and perhaps more than most), it is subject to defeasance by other canons. Scalia & Garner, *supra* at 150.

Finally, in its ultimate paragraph[11] concerning its statutory interpretation the District Court references two additional canons: the "omitted-case" canon and the "negative-implication" canon. (1-ER-23). The Court did so without any explanation of how those two separate

[11] The District Court took judicial notice of the fact that the I-215 Highway states in the South from the I-15 to the I-215/CA 60 East Highway. 1-ER-23 at n.3. It is also noteworthy that the I-15 freeway (to which the I-215 serves as a "connector") does traverse the California border in the north to the states of Nevada, Idaho, and Montana. To the South, the I-15 freeway terminates at the international border with Mexico.

canons applied here. Nonetheless, out of an abundance of caution we address both. First, the "omitted-case" canon can be phrases as "nothing is to be added to what the text states or reasonably implies." (Scalia & Garner, *supra* at 93). That canon has no applicability here: The question is solely whether the phrase "which cross the California border" modifies the closest antecedent—"State Highway" or not. Application of the "omitted case" canon is mysterious in this context. The same for the "negative-implication" canon, which is described as "The expression of one thing implies the exclusion of others (*expressio unius est exclusive alterius*)". Scalia & Garner, *supra* at 107. Again, the District Court's unexplained reference to this particular canon in this context is surprising and without further textual analysis.

## VI. CONCLUSION

The District Court abused its discretion in granting a preliminary injunction by committing errors of law subject to de novo review. The District Court choose to select state law, rather than federal law, to determine for purposes of the First Amendment analysis of commercial speech whether the speech in question was an "illegal activity." That erroneously construes Section 1983 and the federal law (the CSA) that clearly makes marketing and distribution of cannabis illegal in every part of the United States, even California. The District Court's suggestion that "illegality" be somehow filtered by some generic concerns of commercial speech lacks support in the majority opinion of *Central Hudson* or any subsequent case. That case held that if an activity was illegal then a government (including the City of Perris) could regulate commercial speech—without more requirements.

The District Court ignored the federal Supremacy Clause as

interpreted by the U.S. Supreme Court in *Gonzales* and the pre-emptive power of the CSA which bans marketing of cannabis, apparently concluding that California's law designed to encourage the intrastate marketing of cannabis was somehow not in "positive conflict" with the CSA.

The District Court then engaged in textual gymnastics to avoid the inevitable conclusion that even under California state law the use of billboards to advertise cannabis on Interstate Highways is an illegal activity. Instead, by invoking some stated and some unstated canons of construction it departed from the plain text of a disjunctive term "or" and leapt to the contrary conclusion that California's statutory provision is limited to only Interstate Highways that cross the California border. It cited for this conclusion a segment of generic legislative history, using an inserted bracketing of language that no where appears in the source material.

For these reasons, the District Court's grant of a preliminary injunction in favor of appellee Lamar should be *reversed*.

DATED: January 26 , 2026 Respectfully submitted,

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## STATEMENT OF RELATED CASES (CIRCUIT RULE 28-2.6)

There are no other cases which are related to the instant matter.

DATED: January 26, 2026

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**CERTIFICATE OF COMPLIANCE RULE 32(a)(7)(c)**

Pursuant to Federal Rules of Appellate Procedure, rule 32(a)(7)(c), I certify that the APPELLANTS OPENING BRIEF is double spaced, with the exception of quotations that are longer than two lines, and headings and footnotes, as permitted by rule 32(a)(7)(c). The brief is proportionately spaced using 14-point Times New Roman typeface.

Relying on my word processor software (MS-Word) to obtain the count, the brief's total word count, excluding the covers, table of contents, table of authorities, statement of related cases, certificate of compliance, and certificate of service exempted by FRAP 32(f). The Brief contains 11,261 words, in compliance to Cir. R. 32-1 The brief's type size and typeface comply with FRAP 32(a)(5) and (6)

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

DATED: Janaury 26, 2025 Respectfully submitted,

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