

1 JEFF AUGUSTINI, SBN 178358
2 LAW OFFICE OF JEFF AUGUSTINI
3 9160 Irvine Center Drive, Suite 200
4 Irvine, California 92618
5 Telephone: (949) 336-7847
6 Email: jeff@augustinilaw.com

7 ANTHONY J. ALMAZ (SBN 318849)
8 401 Pine Avenue
9 Long Beach, California 90802
10 Telephone: (909) 210-7031
11 Email: anthony.almaz@southcordholdings.com

12 Attorneys for Petitioner/Plaintiff
13 HNHPC, INC.

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 FOR THE COUNTY OF ORANGE

16 HNHPC, INC.,

17 Petitioner/Plaintiff,

18 vs.

19 CALIFORNIA DEPARTMENT OF TAX AND
20 FEE ADMINISTRATION, a department of the
21 California Government Operations Agency; THE
22 CALIFORNIA OFFICE OF
23 ADMINISTRATIVE LAW, a department of the
24 California Government Operations Agency; and
25 DOES 1-50, inclusive,

26 Respondents,

CASE NO. 30-2023-01369643-CU-WM-WJC

**VERIFIED PETITION FOR WRIT OF
MANDAMUS AND COMPLAINT**

Assigned for All Purposes Judge Richard Lee

1 Petitioner HNHPC, INC. (“HNHPC” or “Petitioner”), by and through its attorneys, hereby
2 complains, alleges, and avers as follows against Respondents CALIFORNIA DEPARTMENT OF TAX
3 AND FEE ADMINISTRATION (“CDTFA”), CALIFORNIA OFFICE OF ADMINISTRATIVE LAW
4 (“OAL”) – both of which are departments within the California Government Operations Agency – and
5 DOES 1-50 (collectively “Respondents”):

6 INTRODUCTION

7 1. This action arises because Respondent CDTFA, under the false guise of enacting
8 “interpretive” regulations and using a contrived and non-existent “emergency” to do so shortly before its
9 emergency powers ended, improperly promulgated Regulation 3802, *Gross Receipts from Sales of*
10 *Cannabis and Cannabis Products*, (“Regulation 3802”) and amended Regulation 3700, *Cannabis Excise*
11 *and Cultivation Tax*, (“Regulation 3700”) relating to the payment of excise tax on cannabis-related
12 products in violation of the Administrative Procedures Act (“APA”). This action also arises because
13 Respondent OAL improperly approved the enactment of Regulation 3802 and the amendment to
14 Regulation 3700 in violation of the APA. Respondents’ primary purpose in enacting such new/amended
15 regulations was to improperly *expand the cannabis excise tax base* and to prevent HNHPC and other
16 “Catalyst”-branded dispensaries from continuing to *properly* exclude “cannabis accessories” (*i.e.*, non-
17 cannabis tangible personal property) from the cannabis excise tax. Excluding charges for “cannabis
18 accessories” from excise taxation is in admitted compliance with both the provisions of the Revenue and
19 Tax Code (“RTC”) and the CDTFA’s own existing interpretive regulations, which HNHPC accomplished
20 by separately identifying on an invoice to its customers the price paid for items which constitute both
21 taxable “cannabis” and “cannabis product” and non-taxable “cannabis accessories.”

22 2. Why did Respondents do this? Because, currently, most cannabis retailers have either (i)
23 failed to realize that “cannabis accessories” are *not* subject to cannabis excise taxation, and thus have
24 been massively overpaying such taxes to the State’s unjust benefit; or (ii) failed to properly exclude non-
25 taxable “cannabis accessories” by segregating and “separately stating” such items on their
26 invoices/receipts. As a result, the CDTFA and the State, thus far, have substantially benefited financially
27 from the ignorance of those other dispensaries via the *massive overcollection of cannabis excise tax* on
28

1 items that legally are not subject to excise taxation. However, upon realizing that HNHPC and other
2 “Catalyst”- branded dispensaries properly had excluded “cannabis accessories” for purposes of remitting
3 cannabis excise tax to the CDTFA via procedures established under the CDTFA’s own regulations and
4 which the CDTFA agrees were proper – the CDTFA initiated “emergency regulation” procedures for the
5 purpose of preventing HNHPC and others from continuing (or from implementing) such previously
6 approved cannabis excise tax exclusion practices, and by retroactively rendering such practices
7 ineffective.

8 3. Simply put, the CDTFA abused its emergency regulatory authority to “cram down”
9 improperly *retroactive* and generally incoherent regulations on little or no notice that facially contravene
10 the stated intent of Proposition 64 (“Prop 64”), the Cannabis Tax Laws implemented as part of Prop 64
11 (the “CTL”), commencing with RTC §34010 et seq., as well as their own previously promulgated
12 regulations, all to force HNHPC and other retailers to pay (or continue to pay) cannabis excise tax on
13 items that legally are *not subject to excise taxation*. And in doing so, Respondents: (i) purposefully
14 disregarded the intent of Prop 64, (ii) contradicted the statutory language and history of the CTL (as
15 enacted by Prop 64 and as subsequently amended), (iii) retroactively rendered its own existing and
16 contradictory interpretive regulations “inoperative” without any notice, and (iv) blatantly violated and
17 even ignored the APA’s procedural requirements, including by fabricating a non-existent “emergency.”

18 4. As such, via this Petition, HNHPC seeks a writ of mandate invalidating CDTFA’s newly
19 promulgated Regulation 3802 and amendment to Regulation 3700(i), prohibiting them from
20 implementing or enforcing such regulations and the interpretations therein, and HNHPC also seeks a
21 judicial declaration that, under the CTL, separately stated “cannabis accessories” are *not* subject to the
22 cannabis excise tax – the same conclusion previously reached by both the Legislature and the CDTFA
23 itself, but which the CDTFA improperly is now trying improperly to *reverse* under its newly promulgated
24 “interpretive” regulations. *See Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal. 3d
25 1379, 1389 (“An administrative agency cannot by its own regulations create a remedy which the
26 Legislature withheld”; “Administrative regulations that alter or amend the statute or enlarge or impair its
27 scope are void and courts not only may, but it is their obligation to strike down such regulations”); *Ellena*

1 *v. Department of Ins.* (2014) 230 Cal. App. 4th 198, 205 (where an ordinance defines the specific duties
2 or course of conduct a governing body must take, that course of conduct becomes mandatory and
3 eliminates any discretion); *Alameda Cnty. Deputy Sheriff's Assn. v. Alameda Cnty. Emps.' Ret. Assn.*
4 (2020) 9 Cal. 5th 1032, 1060 (agencies have “no authority to act inconsistently” with governing legislation
5 or to pursue a practice contrary to such legislation).

6 **PARTIES AND VENUE**

7 5. Petitioner HNHPC, INC. (“HNHPC”) at all times was a duly licensed cannabis retail
8 dispensary subject to the payment of California’s cannabis excise tax on cannabis-related products.
9 HNHPC is one of approximately 26 “Catalyst”-branded cannabis dispensaries licensed to operate in the
10 State of California (“State”). HNHPC operates a retail dispensary in Santa Ana, California, which is
11 located in the County of Orange, State of California. At all relevant times, HNHPC has incurred
12 cannabis excise tax liability arising from retail sales transactions that occurred at its Santa Ana
13 dispensary.

14 6. Respondents CDTFA and the OAL are departments within the State of California’s
15 Government Operations Agency (“GOA”), which HNHPC is informed and believes is an
16 administrative agency whose director reports directly to Governor Newsom. As HNHPC understands
17 it, the CDTFA drafted the challenged emergency regulations/amendments and purported to comply
18 with (but did not actually comply with) the rules and procedures established by the APA and which are
19 applicable to the promulgation of emergency regulations. Once CDTFA purportedly completed the
20 emergency regulation process, it submitted its proposed regulations to the OAL, which is specifically
21 charged with assessing whether there in fact is an emergency and whether the CDTFA’s regulations
22 “pass legal muster” and properly can be enacted. HNHPC is informed and believes that Respondents,
23 during the OAL review process, colluded to alter and create new regulations outside of, and in violation
24 of, applicable public notice requirements, and then attempted to “cover up” their misconduct. Because
25 each of them acted improperly in the performance of their respective roles and duties, HNHPC has
26 named both as Respondents herein. Notably, and ironically, both the CDTFA and OAL are housed
27 within the GAO, which in effect creates a situation where the OAL reviews the proposed regulations of
28

1 a *sister agency* (the CDTFA) for legal compliance, while *both* departments are under the control and
2 direction of a single agency (the GAO) and the same director who reports directly to the Governor. So
3 in effect, the OAL acts as a “rubber stamp” and/or advocate for the CDTFA, rather than as an
4 independent and objective agency charged with ensuring the provisions of the APA are strictly adhered
5 to for proposed regulations.

6 7. HNHPC is ignorant of the true names and capacities of the Defendants/Respondents
7 sued herein as DOES 1 through 50, inclusive, and therefore sues such Defendants/Respondents by
8 fictitious names. HNHPC will amend its claims to allege the true names and capacities of DOES 1-50
9 when they have been ascertained. HNHPC is informed and believes, and on that basis, alleges each of
10 the fictitiously named Defendants/Respondents are responsible in some manner for the acts, omissions,
11 events and occurrences herein alleged, and that HNHPC’s damages herein alleged were proximately
12 caused in some way by such DOE Defendants/Respondents.

13 **FACTS RELEVANT TO ALL CAUSES OF ACTION**

14 **STATUTORY AND REGULATORY FRAMEWORK**

15 **Proposition 64, a Ballot Initiative, Legalizes and Regulates Recreational Cannabis Use and Sale**

16 8. On November 8, 2016, California voters passed Proposition 64 (“Prop 64”), a ballot
17 initiative that, *inter alia*, legalized, regulated and taxed recreational marijuana sales in California. As
18 stated in the ballot initiative, “it is the intent of the people in enacting this act to accomplish”, among
19 other things, “tax the growth and sale of [*cannabis*] in a way that drives out the illicit market for
20 [*cannabis*] and discourages use by minors and abuse by adults.” (Emphasis added). To that end, Prop
21 64 added the CTL – (RTC §§34010 et seq. – which established the framework for imposing a cannabis
22 excise tax upon purchasers of cannabis and cannabis products and required cannabis retailers to collect
23 and remit the cannabis excise tax to the CDTFA. (See RTC §34011 (all references to “marijuana” were
24 ultimately changed to “cannabis” pursuant to SB-94)). In accordance with the intent of Prop 64, the
25 voters added to the following language to RTC §34011:

26 Effective January 1, 2018, a [*cannabis*] excise tax shall be imposed on purchasers of [*cannabis*]
27 or [*cannabis*] products sold in this state at a rate of 15 percent of the gross receipts of any retail
28

1 sale by [a dispensary or other person required to be licensed under the Business and Professions
2 Code].

3 9. The voters also added RTC §34011(b) to further clarify that, for purposes of the
4 cannabis excise tax, taxable “gross receipts” included *only* receipts from the sale of: (i) cannabis and
5 cannabis products; (ii) any otherwise distinct and identifiable goods or services sold with cannabis and
6 cannabis products, “if not itemized”, and (iii) any goods or services if a reduction in the price of
7 cannabis or cannabis products is contingent on the purchase of those goods and services. *See* RTC
8 §34011(b) as enacted via Prop 64.

9 10. Significantly for purposes of this Petition, it is clear the drafters of Prop 64, when
10 imposing the cannabis excise tax, expressly distinguished between the price a customer paid for
11 “cannabis” and “cannabis products,” on the one hand, and the price paid for “any otherwise distinct and
12 identifiable goods or services” (*i.e.*, other non-cannabis property or services) on the other hand.

13 11. Specifically, for purposes of the CTL, RTC §34010 adopted and used the terms
14 “cannabis” and “cannabis products” as defined in Health and Safety Code (“H&S”) §§ 11018 and
15 11018.1 (“HSC”):

16 “cannabis” means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds
17 thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt,
18 derivative, mixture, or preparation of the plant, its seeds or resin. H&S § 11018.

19 “cannabis products” means cannabis that has undergone a process whereby the plant material has
20 been transformed into a concentrate, including, but not limited to, concentrated cannabis, or an
21 edible or topical product containing cannabis or concentrated cannabis and other ingredients.
22 H&S § 11018.1.

23 12. Notably, as referenced under CDTFA Regulation 3700(a)(2) and (i), Prop 64 also added
24 H&S Section 11018.2, which defined the term “cannabis accessories” as follows:

25 Any equipment, products or materials of any kind that are used, intended for use, or designed for
26 use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding,
27 converting, producing, processing, preparing, testing, analyzing, *packaging, repackaging,*
28 *storing, smoking, vaporizing, or containing marijuana or for ingesting, inhaling, or otherwise*
introducing marijuana or marijuana products into the human body. (Emphasis added). H&S
§11018.2

13. Upon even a cursory review the above HSC definitions, it is beyond legitimate dispute
the terms “cannabis” and “cannabis product” are intended to include *only* such items derived directly

1 from the plant *Cannabis sativa* L., while “cannabis accessories” are intended to encompass all *other*
2 things not derived therefrom, and which may be sold along with “cannabis” and “cannabis products.”
3 It is therefore generally understood that nearly all cannabis retail sales contain a combination of either:
4 (1) “cannabis” and “cannabis accessories”, (2) “cannabis product” and “cannabis accessories, or (3)
5 “cannabis”, “cannabis products”, and “cannabis accessories.” Regardless of what combination is
6 involved, *only* cannabis and cannabis products by law (and also by pre-Regulation 3802 regulations)
7 are subject to cannabis excise taxation.

8 14. A good illustration of how Regulation 3802 changes the application of the tax can be
9 shown by examining the sale of a “vape pen” as referenced in HSC §11018.2. A cannabis “vape pen”
10 consists of a small cartridge of cannabis oil (including the empty cartridge itself), a plastic pen
11 mechanism, and packaging for the pen. Under a plain reading the CTL, with reference to the above-
12 defined terms provided under the HSC, the cannabis excise tax would not apply to separately stated
13 charges for the cartridge, the pen or its battery (which is used to assist inhalation), or the associated
14 packaging, since all such items are expressly included within the definition of a “cannabis accessory.”
15 Assume a vape pen sold at retail for \$40. If a retailer did not separately state and segregate charges for
16 the cannabis oil (a “cannabis product”) from charges for the pen’s non-cannabis constituent parts, it
17 would be required by law to collect and remit a 15% excise tax on the entire \$40 price of the pen – or
18 \$6 in cannabis excise tax. If, however, the retailer “separately states” the charges for cannabis items
19 and non-cannabis items and sufficiently substantiates that the cannabis oil in the pen cost only \$5, it
20 would be required by law to collect and remit only 75 cents in excise tax (15% of \$5), not \$6. *As*
21 *discussed below, Respondents herein are attempting to force retailers (or more accurately*
22 *consumers) to pay \$6 in excise tax when only 75 cents is actually owed.* Stated differently, to maintain
23 or even expand excise tax revenues to the State, Respondents via regulatory coercion are attempting to
24 force cannabis retailers and consumers to *massively overpay* excise tax and to *prevent them* from
25 complying with the law, which clearly allows them to exclude cannabis accessories from cannabis
26 excise taxation.

1 **SB-94 - Amendments to CTL (as enacted by Prop 64)**

2 15. In 2017, the California State Legislature (“Legislature”) enacted Senate Bill No. (SB) 94
3 (Stats. 2017, ch. 27), which modified and made various amendments to the CTL, including transferring
4 the remittance requirements from the cannabis retailer to the cannabis distributor. The amendments
5 generally were limited to: (i) replacing the word “marijuana” with the word “cannabis”; and (ii)
6 amending provisions of the CTL to require the distributor to collect the cannabis excise tax from the
7 retailer and remit it to the CDTFA. To that end, the Legislature eliminated RTC §34011(b) and
8 amended RTC §34011(a) to replace the term “gross receipts” with “average market price.”

9 16. It is important to note the purpose of the SB-94 amendment was to change the point of
10 remittance of the cannabis excise tax from the retailer to the distributor; it *did not* modify or amend the
11 imposition of the cannabis excise tax, which has always been on “purchasers of cannabis and cannabis
12 products . . . of any retail sale.” Prop 64, SB-94; AB-195; RTC §34011(a); RTC §34011.2(a)(a);
13 Regulation 3700(i); Regulation 3800(b). However, because distributors did not sell “cannabis” or
14 “cannabis products” directly to consumers, the Legislature required the distributor to collect the
15 cannabis excise tax from the retailer based on the computed “average market price” (which is intended
16 to equal the retail selling price). In practice, the retailer would charge the consumer for the tax already
17 collected by the distributor. For that reason, the “average market price” was nothing more than a
18 calculation method to yield the expected “gross receipts” of the retail sale of the “cannabis” and
19 “cannabis product” sold at retail. *See* RTC §§34010(b), (c).¹

20 **Promulgation of 18 CCR §3700**

21 17. Although SB-94 eliminated the “separately stated” language previously set forth in RTC
22 §34011(b), by mid-2019 the CDTFA promulgated Regulation 3700 which established the default rule
23

24 ¹ Calculating the “average market price” turned on the relationship of the distributor and the retailer. In an arm’s
25 length transaction between disinterested parties, “average market price” meant “the average retail price
26 determined by the wholesale cost of the cannabis or cannabis products sold or transferred to a cannabis retailer,
27 plus a mark-up, as determined by the board on a biannual basis in six-month intervals”. The “mark-up” was
28 calculated by the CDTFA as the average markup charged by retailers to its customers in relation to the
wholesale cost of the goods. In a non-arm’s length transaction between related parties (i.e., vertically
integrated), the “average market price” reverted back to “the cannabis retailer’s gross receipts from the retail
sale of the cannabis or cannabis products.” *See* RTC §§34010(b)-(c)(2); §34011(b)(1).

1 that cannabis excise tax applies only to the sale of “cannabis” and “cannabis products”, and not to
2 “cannabis accessories”, and also reinstated (and even “toughened”) the separate statement requirement
3 which had been removed by the Legislature. More specifically, during the rule making process, the
4 CDTFA recognized that although “the CTL does not explicitly state how the cannabis excise tax
5 applies to the sale of cannabis or cannabis product when sold with cannabis accessories,” a review of
6 the defined terms of RTC § 34010 made clear “cannabis accessories such as vaping devices are not
7 considered cannabis or cannabis products and are therefore not subject to the 15 percent cannabis
8 excise tax.” With that analysis in mind, the CDTFA enacted Regulation 3700(i) to clarify that “the
9 cannabis excise tax does not apply to cannabis accessories” *unless* the “distributor does not separately
10 state the sales price of the cannabis or cannabis products from the cannabis accessories.” Regulation
11 3700(i). To support this “separately stated requirement,” the CDTFA relied on Prop. 64’s RTC
12 §34011(b) and determined “the proposed amendments are consistent with the intent of the CTL and
13 California voters.”

14 18. Importantly, Regulation 3700 provides in relevant part: (1) cannabis accessories shall
15 have the same meaning as set forth in HSC §11018.2 (as established by Prop 64, Regulation
16 3700(a)(2)); and (2) the cannabis excise tax does *not* apply to cannabis accessories (including vape
17 cartridges) if the distributor “separately states the price of the cannabis or cannabis products from the
18 cannabis accessories.” *See* Regulation 3700(i) (distributor that separately states must maintain
19 supporting documentation used to establish the cost of the cannabis goods/ accessories, and must
20 separately state such costs on the invoice, receipt or other documentation issued to the purchaser at the
21 time of sale). In other words, via Regulation 3700, the CDTFA *expressly affirmed* that under the
22 language and framework of Prop 64, SB-94 and the resulting CTL, cannabis accessories are *not* subject
23 to cannabis excise tax if charges therefore are separately stated and sales are sufficiently documented.²

24
25 ² While HNHPC is *not* challenging the propriety of enacting Regulation 3700, it does note the regulation (1)
26 purports to reinsert and even toughen the prior “separately stated” language removed via SB-94; and (2)
27 purports to add documentation and timing requirements not set forth in the original statutory framework. In
28 other words, while reaffirming the legal distinction between cannabis products and cannabis accessories for
purpose of excise tax liability (a distinction it improperly eliminated in the challenged “emergency”
regulations), the CDTFA via “interpretive” regulation has tried to make it *much harder* than the drafters of
Prop 64 intended for cannabis retailers to avoid payment of excise taxes on non-cannabis accessories.

1 **AB-195 – Amendments to CTL (as enacted by Prop 64, and as Amended by SB-94)**

2 19. On June 30, 2022, the Legislature enacted Assembly Bill No. (“AB”) 195 which, as
3 relevant here, modified the CTL to *again* shift the burden of remitting the cannabis excise tax – this
4 time from the distributor *back* to the retailer (as originally envisioned in Prop 64). Specifically, AB-
5 195 rendered RTC §34011 inoperative on April 1, 2023, and added RTC §34011.2(a)(1) to replace it.
6 Significantly, RTC §34011.2(a)(1) is identical to its predecessor in all relevant respects, except the
7 cannabis excise tax is – once again – measured by 15% of the “gross receipts” of any retail sale by a
8 cannabis retailer, rather than the “average market price,” since the retailer, not the distributor, is now
9 responsible for remittance of the tax:

10 Effective ~~on or after~~ January 1, 2018~~23~~, a cannabis excise tax shall be imposed on purchasers of
11 cannabis or cannabis products sold in this state at a rate of 15 percent of the ~~average market price~~
12 **gross receipts** of any retail sale by a cannabis retailer. See Subdivision (a)(1) of RTC section
13 34011.2 (as compared to subdivision (a)(1) of RTC section 34011).

14 20. It is important to note AB-195 *did not*: (1) modify, amend, or expand any of the relevant
15 definitions provided in RTC §34010, including cannabis, cannabis product and cannabis accessory; (2)
16 amend the RTC to impose cannabis excise tax on “cannabis accessories”; or (3) amend any other
17 provision of the CTL that would reasonably cause anyone (including the CDTFA) to believe RTC
18 §34011.2(a)(1) should be interpreted as *expanding* the cannabis excise tax to include “cannabis
19 accessories” or other non-cannabis tangible personal property. In essence, the Legislature simply
20 reverted the CTL back to what existed when Prop 64 initially was enacted, and “put back” the original
21 language set forth in RTC §34011 as set forth in Prop 64.

22 21. Although enacted as part of AB-195 in June 2022, RTC §34011.2 became effective on
23 January 1, 2023. In response to the new provision, the CDTFA promulgated a series of emergency
24 regulations, including amendments to Regulation 3700, that became effective January 30, 2023. As
25 relevant here, the CDTFA promulgated Subdivision (b) of Emergency Regulation 3800, *Cannabis*
26 *Excise Tax and Cannabis Retailer Excise Tax Permit* (“Regulation 3800”) to clarify that under RTC
27 §34011.2 the imposed cannabis excise tax is “15 percent of the cannabis retailer’s gross receipts from
28 the retail sale of the *cannabis* and *cannabis products* to the purchaser[.]” 18 CCR §3800(b) (Emphasis

1 added.). Furthermore, in the various amendments to Regulation 3700 initially made in response to
2 RTC §34011.2, *the CDTFA neither modified nor altered* Regulation 3700(i). The CDTFA understood
3 that, notwithstanding the AB-195 amendments, the CTL continued to impose cannabis excise tax *only*
4 *on* receipts “from the retail sale of *cannabis* and *cannabis products*,” and that Regulation 3700(i)
5 properly describes the cannabis excise tax regime after enactment of RTC §34011.2.

6 **Summary of CTL from Prop 64 to AB-195**

7 22. Briefly stated, the evolution of the CTL, from Prop 64 to AB-195, can be described as a
8 series of shifts in the collection and remittance of the cannabis excise tax from the distributor to the
9 retailer, while the non-taxable treatment of non-cannabis tangible personal property (such as cannabis
10 accessories) has remained consistent.

11 23. Under the CTL, as enacted by Prop 64, non-cannabis tangible personal property was
12 subject to the cannabis excise tax *only when*: (i) the sale of non-cannabis tangible personal property, if
13 sold with cannabis or cannabis products, was “*not separately stated*” on an invoice or receipt given to
14 the purchaser; and (ii) a reduction in the price of “cannabis” or “cannabis product” was conditioned on
15 the purchase of non-cannabis tangible personal property. RTC §§34011(a), (b), as enacted under Prop
16 64 on November 9, 2016 (emphasis added). Thus, under Prop 64, “cannabis accessories” were not
17 subject to cannabis excise tax.

18 24. Under the CTL, as amended by SB-94, the CDTFA recognized non-cannabis tangible
19 personal property remained excluded from cannabis excise tax, promulgating a rule under Regulation
20 3700(i) that required charges for such items to be separately stated on the invoice when sold with
21 cannabis or cannabis products. *See* Regulation 3700(i).

22 25. Under the CTL, as amended by AB-195, the CTL continued to exclude non-cannabis
23 tangible personal property from the imposition of the cannabis excise tax. Indeed, HNHPC and the
24 CDTFA both agreed (at least as of January 2023) that notwithstanding the change in the remittance
25 point from distributor to retailer, RTC §34011.2 continued to impose cannabis excise tax *only* upon
26 gross receipts from the sale of cannabis and cannabis products (as defined in Prop 64) and not on the
27
28

1 sale of separately stated cannabis accessories. The exclusion for separately stated charges on cannabis
2 accessories has never changed from Prop 64 to now and there is no support to the contrary.

3 26. Yet, *in the twelfth month of 2023*, and on the eve of the expiration of its emergency
4 regulatory authority (which ends December 31, 2023), Respondents enacted an emergency regulation –
5 Regulation 3802 – that under the false guise of “clarification” of RTC §34011.2 directly contradicts its
6 own interpretive Regulation 3800 (which ironically itself was promulgated to “clarify” RTC §34011.2)
7 *and* also made improper “emergency” amendments to inactivate the CDTFA’s prior interpretation in
8 Regulation 3700(i) that directly contradict its “new” interpretation of the CTL’s treatment of cannabis
9 accessories.

10 27. This begs the obvious question – what happened between January 1, 2023 and
11 December 2023 to cause CDTFA to do a “180-degree turn” and misuse the emergency regulation
12 process to “jam through” amendments that flatly contradict the language and framework of the CTL
13 and two of its own prior interpretive regulations? The answer is simple – HNHPC and the other
14 Catalyst-branded dispensaries remitted excise tax payments in conformity with the CTL and those
15 regulations, and the CDTFA was not happy with the amount paid or the fact they were able to properly
16 distinguish between taxable cannabis/cannabis products and non-taxable cannabis accessories. Stated
17 differently, when the CDTFA learned HNHPC and the other Catalyst-branded dispensaries had found a
18 way to separately state cannabis accessories, thereby exempting them from excise taxation,
19 Respondents engaged in a “mad scramble” to do anything and everything possible to *prevent* them
20 from continuing to do so and to dissuade other retailers from even *thinking* of also doing so. In short,
21 this action was made necessary by the CDTFA’s legally improper “money grab” in violation of the
22 CTL and its own regulations, and the OAL’s legally improper approval of the CDTFA’s legally invalid
23 “emergency” regulations.

24 CDTFA’S MOTIVATION

25 Excise Tax Audit of HNHPC and Other “Catalyst” Entities by the CDTFA

26 28. For at least half the year in 2022, an affiliate of Catalyst was the distributor for most if
27 not all of the Catalyst-branded dispensaries (the “Catalyst Distributor”), including HNHPC.

28

1 29. During that period, the Catalyst Distributor separately stated the price of “cannabis”,
2 “cannabis products,” and “cannabis accessories” it sold to HNHPC and other Catalyst-branded
3 dispensaries, and properly calculated and remitted the cannabis excise tax to the CDTFA based solely
4 on “cannabis” and “cannabis products” it distributed to those Catalyst-branded dispensaries.

5 30. In or around March 2023, the CDTFA initiated an audit of the Catalyst Distributor for
6 pre-January 1, 2023 cannabis excise tax payments – *i.e.*, during the period the Catalyst Distributor was
7 still legally responsible under RTC §34011 for remitting cannabis excise taxes.

8 31. In connection with the audit, the Catalyst Distributor maintained that its calculation of
9 the cannabis excise tax fully complied with, *inter alia*, RTC §34011 and Regulation 3700(i).

10 32. Eventually, the CDTFA acknowledged *in writing* that the Catalyst Distributor’s
11 interpretation of its excise tax obligations was correct, and that the “cannabis accessories” which had
12 been separately stated on invoices provided to the Catalyst-branded retailers (including HNHPC) were
13 *not* subject to cannabis excise tax. Specifically, in an emails dated September 8, 2023 and September
14 20, 2023, Joseph Ward of the CDTFA confirmed that separately stated and substantiated cannabis
15 accessories distributed prior to January 1, 2023 were not subject to cannabis excise taxation. Thus, for
16 the pre-2023 cannabis excise tax periods, the CDTFA conceded Catalyst *correctly* interpreted and
17 applied the cannabis excise tax law, and more importantly, that cannabis accessories legally *were not*
18 subject to cannabis excise taxation.

19 33. Beginning after January 1, 2023, the Catalyst-branded dispensaries, including HNHPC,
20 applied the same procedures set forth in Regulation 3700(i) to maintain the proper collection of the
21 cannabis excise tax from its customers. In so doing, the Catalyst-branded dispensaries, including
22 HNHPC, separately stated on receipts provided to the customer the price of the “cannabis”, “cannabis
23 product”, and “cannabis accessories” purchased in each retail sales transaction.

24 34. Under this practice, the Catalyst-branded dispensaries, including HNHPC, properly
25 collected cannabis excise tax on “cannabis” and “cannabis products” sold in consumer transactions – in
26 full compliance with RTC §34011.2, Regulation 3700(i) (which was then still in full effect), and the
27
28

1 CDTFA’s newly promulgated Regulation 3800(b) reaffirming the interpretation in Regulation 3700(i)
2 that only cannabis and cannabis products legally were subject to cannabis excise taxation.

3 35. However, in or around May of 2023, several Catalyst-branded dispensaries, including
4 HNHPC, received notice the CDTFA was auditing their excise tax remittances for Q1 and Q2 2023.

5 36. In or around September 2023, HNHPC learned the CDTFA had rejected its position that
6 cannabis excise tax does not apply to gross receipts of sales of “cannabis accessories” when they are
7 separately stated and segregated out on a consumer invoice. More specifically, the CDTFA took the
8 position that AB-195 amended the CTL to such an extent that, starting January 1, 2023, retailers were
9 required to collect and remit cannabis excise tax on retail sales of “cannabis accessories.” Notably, its
10 position was the polar opposite of the interpretation contained in Regulation 3800(b), which the
11 CDTFA promulgated in January 2023 to *interpret* the newly effective RTC §34011.2. In short, over a
12 period of eight months, the CDTFA’s “interpretation” on the taxability of cannabis accessories began to
13 resemble a notable Katy Perry song – it was hot then cold, yes then no, in then out, up then down.
14 Indeed, the only people that appeared to be “confused” on the subject was the CDTFA itself.

15 37. On September 14, 2023, the CDTFA issued a Notice of Determination to multiple
16 Catalyst-branded dispensaries, including HNHPC, alleging its audit found a significant underpayment
17 of cannabis excise tax. In response, the Catalyst-branded dispensaries, including HNHPC, informed
18 the CDTFA auditors that they intended to appeal the CDTFA’s audit determination. Notably, the
19 alleged underpayment was based almost entirely on the CDTFA’s newly-contrived position that
20 cannabis accessories *legally were* subject to cannabis excise taxes, and Catalyst (including HNHPC)
21 had failed to collect and remit excise tax on separately stated cannabis accessories.

22 38. ***On October 2, 2023, shortly after Catalyst/HNHPC informed the CDTFA of their***
23 ***intention to appeal, the CDTFA initiated “emergency” rulemaking proceedings for the purpose of***
24 ***enacting new “emergency” regulations to provide “bootstrap” support for its interpretation on***
25 ***cannabis accessories, and also (as HNHPC later learned) laid the groundwork to remove/de-activate***
26 ***“bad” interpretive regulations that fatally undermined its newly-contrived tax position – including***
27 ***both Regulations 3700(i) and 3800(b).***

28

1 39. On October 11, 2023, HNHPC and the other Catalyst-branded dispensaries filed a
2 formal notice of appeal of the CDTFA’s audit determination. HNHPC contends the “rush” to
3 promulgate Regulation 3802 and to deactivate 3700(i) was driven by CDTFA’s desire to “beat” the
4 Catalyst appeal, to prevent them from continuing to separately state and exclude cannabis accessories
5 from cannabis excise taxation, and to dissuade other dispensaries from following Catalyst’s lead.

6 **CDTFA’S “EMERGENCY REGULATIONS”**

7 **The CDTFA Proposes Regulation 3802 Using its Emergency Rulemaking Authority**

8 40. On October 2, 2023, the CDTFA distributed a Discussion Paper to interested parties
9 seeking input on whether the CDTFA should, pursuant to its soon-expiring emergency rulemaking
10 authority under RTC §34013, adopt Regulation 3802 to “clarify the meaning of ‘gross receipts’ from
11 the sale of cannabis and cannabis products for purposes of the cannabis excise tax imposed by [RTC
12 Section 34011.2].” The CDTFA held an interested persons meeting on October 12, 2023, and
13 permitted interested parties to submit written comments by no later than October 20, 2023.

14 41. The consensus among the interested parties, including HNHPC, was that proposed
15 Regulation 3802: (1) improperly expanded the cannabis excise tax and went far beyond the statutory
16 parameters of the CTL, (2) conflicted with, and was contrary to, the CDTFA’s own cannabis
17 regulations, and (3) generally was incomprehensible. As far it could tell, not one interested party that
18 meaningfully participated in the rulemaking process agreed with the CDTFA’s “new” interpretation
19 that cannabis excise tax could be imposed on items other than “cannabis” or “cannabis products.”

20 42. Many of the interested parties also expressed their belief that the CDTFA sought without
21 legal authority to promulgate emergency regulations relating to Sales and Use Tax Law (“SUTL”)
22 (RTC section 6001, et seq.) and to implement “long standing opinions” of its legal counsel.

23 43. In response to the comments, the CDTFA modified the proposed provisions of
24 Regulation 3802 and – without additional input from the interested parties – submitted its Notice of
25 Proposed Emergency Action (“Notice”) to the OAL on December 5, 2023.

26 44. After carefully reviewing the Notice, HNHPC discovered that, not only did the CDTFA
27 change the purported scope of Regulation 3802 – from “clarifying the meaning of ‘gross receipts’ from
28

1 the sale of cannabis and cannabis products for purposes of the cannabis excise tax imposed by [RTC
2 Section 34011.2]” to “clarify[ing] the meaning of the phrase ‘gross receipts from any retail sale by a
3 cannabis retailer’ as used in subdivision (a)(1) of RTC [S]ection 34011.2,” the CDTFA also failed to
4 remove many of the fatal flaws of the proposed provisions of Regulation 3802.

5 45. HNHPC also discovered the CDTFA’s alleged effort to “clarify the meaning of the
6 phrase ‘gross receipts from any retail sale by a cannabis retailer’ as used in subdivision (a)(1) of RTC
7 [S]ection 34011.2,” was entirely devoid of any analysis or meaningful discussion of: (i) the framework
8 of the CTL or its own prior interpretations, (ii) the relevant statutory language, (iii) any of the defined
9 terms of the CTL, including the three (3) defined terms used in the phrase itself; (iv) any informative
10 regulations or court decisions; or even (iv) the taxability of “cannabis accessories”. In fact, the CDTFA
11 mentions the relevant phrase *only once* in its analysis, where it proclaimed, without explanation, that
12 “subdivision (a) of RTC Section 34011.2 . . . makes the ‘gross receipts of any retail sale by a cannabis
13 retailer’ the measure of tax.” The CDTFA then saw fit to promulgate, with no explanation at all,
14 provisions of Regulation 3802 that subject all tangible personal property to the cannabis excise tax,
15 *except* for “reasonable amounts charged for” “optional tangible personal property.” In short,
16 Regulation 3802 is nothing more than an expression of what the CDTFA now *wishes* the CTL said, but
17 does not actually say and significantly has *never said*.

18 46. In an effort to prevent the promulgation of this dangerous and ill-conceived “dumpster
19 fire” regulation, HNHPC joined other Catalyst-branded dispensaries in submitting a written comment
20 to the OAL informing them it should disapprove Regulation 3802 on the grounds there was no
21 emergency and the regulation failed (and continues to fail) to comply with (i) the clarity standard, (ii)
22 the necessity standard, (iii) the consistency standard, (iv) the authority standard, and (v) reference
23 standard as required in Government Code (“GC”) section 11349.1 (the “Catalyst Written Comment”).

24 47. The Catalyst Written Comment was submitted in compliance with 1 CCR §55(b) and
25 OAL therefore legally was required to consider it.

1 48. Unfortunately, on December 15, 2023, the OAL Staff Attorney informed Catalyst via
2 email that Regulation 3802 “was approved and filed with the Secretary of State” along with a copy of
3 the filing submitted to the Secretary of State.

4 49. A review of the filing informed HNHPC that, for the first time, the CDTFA also sought
5 to amend, and the OAL permitted it to amend, subdivision (i) of Regulation 3700 to add a new
6 subsection (i)(3) that reads “Subdivision (i) is inoperative on and after January 1, 2023.”

7 50. The CDTFA’s intention to amend 3700 was never disclosed in its Discussion Paper, in
8 the Notice, on its website, or in the rulemaking file it submitted to the OAL. In fact, it was not until the
9 OAL Staff Attorney provided the Catalyst Group with a copy of the filing itself did the Catalyst Group
10 discover Regulation 3700 had been subjected to a drastic amendment in complete violation of the
11 notice and public participation requirements of the APA. Indeed, the fact Regulation 3700 had been
12 amended was *handwritten into* the approval form – evidencing the CDTFA submitted its amendments
13 thereto *after* it submitted the package to the OAL for approval. Incredibly, and improperly, the OAL
14 approved the amendments to Regulation 3700 despite being submitted at the 13th hour without any
15 notice and without actually undergoing the rulemaking process, emergency or otherwise.

16 51. This surprise amendment prompted HNHPC to immediately make a Public Records Act
17 Request (“PRA”) on December 15, 2023 to both the CDTFA and OAL in order to better understand
18 what the CDTFA submitted to the OAL (the “PRA Request”). The PRA Request asked for the entirety
19 of the rulemaking file and the written communications, if any, between the CDTFA and the OAL
20 related to the submission, and subsequent approval, of Regulation 3802 and the amendment of 3700.
21 The OAL provided at least some of the requested documents and communications on December 22,
22 2023, and its revelations were *shocking* in that, for the first time, HNHPC learned the CDTFA had
23 substantially modified Regulation 3802 after submission to the OAL, and the OAL had approved that
24 substantially modified version of Regulation 3802, without informing the interested parties.

25 52. Specifically, the PRA Request revealed that immediately upon receiving the Catalyst
26 Written Comment, the CDTFA and OAL engaged in a concerted *joint* effort to use the final days of the
27
28

1 OAL’s regulatory review to “fix” some of the many fatal flaws in the proposed emergency regulation,
2 included holding a “Teams” meeting on December 14, 2023 “to discuss [the OAL’s] review”.

3 53. Although the details of the meeting were not disclosed, the emails between the CDTFA
4 and OAL reveal the OAL had concluded that the proposed regulations failed to satisfy at least the
5 ‘clarity’ standard set forth in GC §11349.1(a)(3). In response, the CDTFA committed to “working on
6 the revisions to Regulation 3700 and 3802 that [the OAL] suggested . . . so CDTFA does not need to
7 withdraw the rulemaking file.” Pursuant to that commitment, the CDTFA began sharing revisions to
8 Regulation 3802 and Regulation 3700 to see if “they are okay with [OAL] management.”

9 54. Then, on December 15, 2023 (*i.e.*, the last day of the OAL’s review period), the OAL
10 confirmed it was satisfied the revised text and that it would “need the final version of the text with
11 authorization to *swap* it out of the record” and to have the CDTFA “email [it] the *necessary fixes* by
12 10:30am so [the OAL] can get everything ready for filing.” After the CDTFA complied, the OAL
13 approved the modified provisions of Regulation 3802 and the amendment to 3700 and immediately
14 filed the emergency regulations with the Secretary of State for publication.

15 55. In short, the OAL during its review period concluded that the emergency regulations did
16 not comply with the APA. However, rather than disapprove the emergency regulation or forcing the
17 CDTFA to withdraw them and to start the APA process over again (as it should have), the OAL instead
18 worked directly with the CDTFA to: (i) amend Regulation 3700 and make substantial changes to
19 Regulation 3802; (ii) “*swap*” the emergency regulations in the rulemaking file; and (iii) approve the
20 modified emergency regulations and immediately submit the regulations to the Secretary of State. To
21 add insult to injury, neither the CDTFA nor the OAL ever informed the public of the changes to
22 Regulation 3802 or the amendment to Regulation 3700. In fact, HNHPC may be the only interested
23 party aware that further changes were made to Regulation 3802. As far as the Notice is concerned, the
24 CDTFA sought to enact Regulation 3802 as provided therein. Then, within 15 days, the OAL approved
25 a substantially different version of Regulation 3802 *and* an amendment to 3700 that was never
26 disclosed. Said differently, the CDTFA submitted A, the OAL approved B, did not tell the public what
27
28

1 they had done, and then incredibly they conspired to *alter the official rule making file* in an effort to
2 cover up their misconduct.

3 **FIRST CAUSE OF ACTION**
4 **PETITION FOR PEREMPTORY WRIT OF MANDATE**
5 (AGAINST ALL RESPONDENTS)

6 56. HNHP C incorporates as though set forth herein in full the allegations contained in
7 Paragraphs 1-55 above.

8 57. Via this Cause of Action, HNHP C challenges multiple different actions of Respondents.
9 First, HNHP C challenges the promulgation of the emergency amendment to Regulation 3700 on the
10 grounds there was no emergency, Respondents failed to provide any notice of their intention to amend
11 that regulation, because it constitutes an improper retroactive amendment, and because it does not meet
12 the legal standards necessary to promulgate or amend an emergency regulation. Second, HNHP C
13 challenges the promulgation on emergency Regulation 3802 on the grounds no emergency existed, it fails
14 to satisfy the legal standards for regulation promulgation (and discussed further herein), and because the
15 “interpretation” advanced therein is nonsensical, defies the intent, express provisions and statutory
16 framework of the CTL, cannot be reconciled with its prior interpretations as set forth in Regulations
17 3700(i) and 3800(b) and its audit of Catalyst Distributor, and cannot even be internally reconciled with
18 the express language of RTC §34011.2 itself. Third, Respondents violated the APA by secretly changing
19 the proposed amendment to Regulation 3700 and Regulation 3802 during the OAL review period, while
20 withholding that information from the public then by altering the official file to conceal their misconduct.
21 Fourth, HNHP C seeks an order compelling Respondents to comply with Prop 64, the CTL under a proper
22 interpretation of the law, i.e., that cannabis accessories are not subject to cannabis excise tax, to prohibit
23 them from interpreting and applying the governing law incorrectly or acting contrary to the controlling
24 statutes, and to force them to comply with the APA and the controlling emergency regulation procedures.

25 58. HNHP C’s challenges require the Court to determine whether the emergency rulemaking
26 standards were satisfied, and to interpret and apply the language and framework of the CTL, as enacted
27 by Prop 64 and the amendments made thereto, the APA, the CDTFA’s own prior rulings and
28

1 interpretations, and the requirements of the OAL review process, the entirety of HNHPC’s challenge is
2 subject to *de novo judicial review* in connection with which little if any deference should be given to
3 Respondents’ newly contrived interpretations or applications of the relevant statutes and regulations.
4 *Sims*, 216 Cal. App. 4th at 1080–81; *Yamaha Corp. of America v. State Board of Equalization* (1998) 19
5 Cal. 4th 1, 11; *State Farm Gen. Ins. Co. v. Lara* (2021) 71 Cal. App. 5th 148, 169 (“Interpretation of a
6 statute or regulation is, of course, an issue of law for the court [citations], as is the question whether a
7 regulation is consistent with the authorizing statute [citations]. Thus, we must review the interpretations
8 of the [agency] and the trial court *de novo*, and come to our own independent conclusions on these
9 issues”); *Dyna-Med*, 43 Cal. 3d at 1389 (“An administrative agency cannot by its own regulations create
10 a remedy which the Legislature withheld”; “Administrative regulations that alter or amend the statute or
11 enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such
12 regulations”); *Alameda Cnty.*, 9 Cal. 5th at 1060 (agencies have “no authority to act inconsistently” with
13 governing legislation or to pursue a practice contrary thereto).

14 **REGULATION 3802 AND THE AMENDMENTS TO REGULATION 3700 MUST BE**
15 **INVALIDATED FOR FAILURE TO IDENTIFY OR SUBSTANTIATE THE EXISTENCE OF**
16 **AN ACTUAL “EMERGENCY”**

17 59. The CDTFA enacted Regulation 3802, and also amended Regulation 3700(i) to add
18 subsection (1)(3), pursuant to its grant of emergency rulemaking authority under RTC §34013(e):

19 **Until January 1, 2024**, the department may prescribe, adopt, and enforce any emergency
20 regulations as necessary to implement, administer, and enforce its duties under this division. Any
21 emergency regulation prescribed, adopted, or enforced pursuant to this section shall be adopted
22 in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title
23 2 of the Government Code, and, for purposes of that chapter, including Section 11349.6 of the
Government Code, the adoption of the regulation is an emergency and shall be considered by the
Office of Administrative Law as necessary for the immediate preservation of the public peace,
health and safety, and general welfare. (Emphasis added.)

24 60. Under GC §11350(a), “[a]ny interested person may obtain a judicial declaration as to the
25 validity of any regulation or order of repeal by bringing an action for declaratory relief in the superior
26 court in accordance with the Code of Civil Procedure . . . The regulation or order of repeal may be
27 declared to be invalid for a substantial failure to comply with this chapter, or, in the case of an emergency
28

1 regulation or order of repeal, upon the ground that the facts recited in the finding of emergency prepared
2 pursuant to [GC §11346.1(b)] do not constitute an emergency within the provisions of [§] 11346.1.”

3 61. GC § 11346.1(b)(1) further provides a regulation “may be adopted as an emergency
4 regulation or order of repeal” only if “if a state agency makes a finding that the adoption of a regulation
5 or order of repeal is necessary to address an emergency.” GC § 11346.1(b)(2) provides that “[a]ny
6 finding of an emergency shall include . . . a description of the specific facts demonstrating the existence
7 of an emergency and the need for immediate action, and demonstrating, by substantial evidence, the need
8 for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific and
9 to address only the demonstrated emergency.” And GC §11346.1(b)(2) provides that “[t]he enactment
10 of an urgency statute shall not, in and of itself, constitute a need for immediate action” and “[a] finding
11 of emergency based only upon expediency, convenience, best interest, general public need, or
12 speculation, shall not be adequate to demonstrate the existence of an emergency.”

13 62. Finally, even the acknowledged existence of an emergency requires additional supporting
14 disclosures: “[i]f the situation identified in the finding of emergency existed and was known by the
15 agency adopting the emergency regulation in sufficient time to have been addressed through
16 nonemergency regulations . . . the finding of emergency shall include facts explaining the failure to
17 address the situation through nonemergency regulations.” GC §11346.1(b)(2).

18 63. In the present case, the Notice’s *Statement of Emergency* does nothing more than
19 regurgitate the statutory requirements contained in RTC §§34013(c) and (e) and is *entirely devoid* of “a
20 description of the specific facts demonstrating the existence of an emergency and the need for immediate
21 action,” as required by GC §11346.1(b)(2). In addition, nowhere in the Notice did the CDTFA
22 demonstrate “by substantial evidence, the need for the proposed regulation to effectuate the statute being
23 implemented, interpreted, or made specific and to address only the demonstrated emergency” as required
24 by GC §11346.1(b)(2). In fact, the CDTFA provided *no evidence whatsoever* demonstrating the
25 proposed regulations were even narrowly tailored to “to address only the demonstrated emergency.”

26 64. Simply put, when acting, it is clear Respondents relied on the language of GC §11349.6(c)
27 that “the adoption of the regulation is an emergency and shall be considered by the Office of
28

1 Administrative Law as necessary for the immediate preservation of the public peace, health and safety,
2 and general welfare.” However, their blind reliance thereon was/is legally improper and deficient, since
3 by law “[t]he enactment of an urgency statute shall not, in and of itself, constitute a need for immediate
4 action” and that “[a] finding of emergency based only upon expediency, convenience, best interest,
5 general public need, or speculation, shall not be adequate to demonstrate the existence of an emergency.”

6 65. Furthermore, although GC Section 11349.6(c) requires the OAL to treat the regulation “as
7 necessary for the immediate preservation of the public peace, health and safety, and general welfare,”
8 GC §11346.1(b)(2) nevertheless requires, at a minimum, a disclosure of facts necessary and sufficient to
9 establish when the CDTFA became aware of the “emergency” and that CDTFA did not have “sufficient
10 time to [address the emergency] through nonemergency regulations,” which would require it to provide
11 specific “facts explaining the failure to address the situation through nonemergency regulations”. As
12 stated before, *the Notice is devoid of any such facts or information* – and, absent such facts, it should be
13 presumed (if a presumption is required) the “emergency” commenced as of June 20, 2022, the date AB-
14 195 was enacted (*i.e., 18 months prior to the promulgation of the emergency regulations*).

15 66. In short, a judicial declaration invalidating the emergency regulations is proper, warranted
16 and legally required under GC §11350(a) because the Notice (i) is devoid of facts identifying or
17 substantiating an actual “emergency,” (ii) relied solely and improperly on the existence of an urgency
18 statute in its *Statement of Emergency*, and (iii) failed to provide *any details whatsoever* identifying when
19 the CDTFA became aware of the emergency and whether the “emergency” could have been resolved via
20 the ordinary rulemaking process, as opposed to requiring emergency rule making powers.

21 **THE EMERGENCY REGULATIONS FAIL TO SATISFY THE CENTRAL “NOTICE” AND**
22 **“PUBLIC PARTICIPATION” REQUIREMENT OF THE APA AND MUST BE**
23 **INVALIDATED**

24 67. The CDTFA enacted Regulation 3802, and also amended Regulation 3700, pursuant to its
25 grant of emergency rulemaking authority under RTC §34013(e).

26 68. Pursuant to GC §11350(a), “[a]ny interested person may obtain a judicial declaration as
27 to the validity of any regulation or order of repeal by bringing an action for declaratory relief in the
28

1 superior court in accordance with the Code of Civil Procedure . . . The regulation or order of repeal may
2 be declared to be invalid for a *substantial failure* to comply with this chapter.”

3 69. Under the APA, the “adoption, amendment, or repeal of an emergency regulation” are
4 required to “substantially comply” with GC §§11346.1, 11349.5, and 11349.6.

5 70. GC §11346.1(a)(2) requires that, unless “the emergency situation clearly poses such an
6 immediate, serious harm that delaying action to allow public comment would be inconsistent with the
7 public interest”, then “[a]t least five working days before submitting an emergency regulation to the
8 [OAL], the [CDTFA] shall . . . send a notice of the proposed emergency action to every [interested party].
9 The notice shall include both of the following: (A) The specific language proposed to be adopted and (B)
10 The finding of emergency required by subdivision (b).”

11 71. Here, not only did CDTFA fail to provide the requisite notice mandated by GC
12 §11346.1(a)(2) within “five working days before submitting an emergency regulation to the [OAL],” it
13 was the OAL who informed HNHPC of the emergency amendment *after the OAL had submitted the*
14 *filing to the Secretary of State*. Furthermore, although GC §11346.1(a)(3) provides an exception to the
15 notice requirement in the case of “immediate, serious harm,” the fact the CDTFA provided the Notice
16 with respect to Regulation 3802 clearly demonstrates the non-existence of such a heightened emergency
17 sufficient to dispense with the notice requirement vis-à-vis the amendment to Section 3700.

18 72. Moreover, although the CDTFA issued the Notice related to the enactment of Regulation
19 3802, the Notice, itself does not satisfy the requirements of GC §11346.1(a)(2) for purposes the
20 amendment to Regulation 3700(i), since the Notice did not include “the specific language [of Regulation
21 3700(i)] proposed to be adopted.”

22 73. In addition, and as a natural consequence of failing to provide *any notice* as required by
23 GC §11346.1(a)(2), the CDTFA also failed to comply with GC §11346.1(b)(2), which requires that the
24 notice include the information set forth in GC §11346.5(a)(2)-(a)(6) – namely: (2) reference to authority;
25 (3) the informative digest; (4) other matters as prescribed by statute; (5) the local mandate determinations;
26 and (6) the necessary financial estimates.

1 74. Moreover, during its review period, the OAL revealed via PRA Request responses that
2 Regulation 3802, as submitted to it, failed to satisfy the ‘clarity’ standard under GC §11349.1(a)(3). But
3 rather than disapprove it on that basis, OAL instead worked directly with the CDTFA to substantially
4 modify the provisions of Regulation 3802 so it would allegedly comply with the ‘clarity’ standard.
5 Importantly, the modifications made to the provisions of Regulation 3802 during the OAL process are:
6 (i) substantial because they operate to bring Regulation 3802 into alleged compliance with the ‘clarity’
7 standard; and (ii) were never provided to the interested parties pursuant under the procedures set forth in
8 GC §11346.1(a)(2).

9 75. As previously mentioned, the Court may declare Regulation 3802 and the amendment to
10 Regulation 3700 invalid for “*substantial failure* to comply with the [APA].” Case law provides that
11 “substantial compliance with a statute is dependent on the meaning and purpose of the statute.” *Freeman*
12 *v. Vista de Santa Barbara Associates LP* (2012) 207 Cal.App.4th 791, 793. Furthermore, “noncompliance
13 [with the APA] is insubstantial, or ‘harmless,’ *only where it* does not compromise any ‘reasonable
14 objective’ of the APA.” *Sims*, 216 Cal.App.4th at 1073. The objectives of the APA are “ ‘to provide a
15 procedure whereby people to be affected may be heard on the merits of the proposed rules’ ” and ensure
16 “ ‘meaningful public participation in the adoption of administrative regulations by state agencies.’ ” *Id.*

17 76. Here, both the CDTFA and OAL *purposefully and knowingly* ignored the APA, and did
18 so with the intent of depriving interested parties (including HNHPC) of notice and any reasonable
19 opportunity to be “heard on the merits of the proposed rules’ ” and to ensure “ ‘meaningful public
20 participation in the adoption of administrative regulations by state agencies.’ ” *Id.* As such, a judicial
21 declaration invalidating the emergency regulation is not only proper under GC §11350(a), but is both
22 warranted and legally required.

23 77. And to be crystal clear, the CDTFA’s failure to provide the required notice and permit
24 “meaningful public participation” cannot remotely be characterized as *harmless*. First, Regulation
25 3700(i) is a critical regulation that sets forth the CDTFA’s own understanding that “the cannabis excise
26 tax does not apply to cannabis accessories.” Although the CDTFA claims AB-195 rendered Regulation
27 3700(i) inoperable, that position ignores that the provisions of Regulation 3700(i) are untethered to any
28

1 specific statute of the CTL. Furthermore, the CDTFA was fully aware HNHPC and the Catalyst-branded
2 dispensaries intended to rely on Regulation 3700(i) as part of their legal arguments in the impending tax
3 appeal with the CDTFA. In addition, the modifications to the provisions of Regulation 3802 are
4 substantial because they seek to bring Regulation 3802 into compliance with the ‘clarity’ standard
5 without participation of the interested parties, even though the ‘clarity’ standard is intended to benefit the
6 interested parties. Not only is this *harmful*, but it is an unquestionable abuse of the CDTFA’s rulemaking
7 authority, emergency or otherwise.

8 78. The amendment to Regulation 3700(i) also must be invalidated because Respondents
9 improperly “jammed through” via a no-notice “emergency” regulation an amendment as of December
10 15, 2023 that purported to *retroactively rescind* the CDTFA’s own excise tax interpretation contained
11 in Section 3700(i) as of January 1, 2023 (nearly a year prior to the emergency amendment). The
12 Legislature did not expressly or implicitly authorize Respondents to promulgate or enact such retroactive
13 regulations, and therefore the amendment to Section 3700 was legally improper and exceeded the scope
14 of Respondents’ legal authority. *See California Medical Assn v. Lackner* (1981) 117 Cal. App. 3d 552,
15 564; *McClung v. Employment Dev. Dept.* (2004) 34 Cal. 4th 467, 475 (strong presumption *against*
16 retroactive application of *statutes* absent express language of retroactivity or a clear and unavoidable
17 implication that the Legislature intended retroactive application”). Here there is no language even
18 remotely suggesting that the voters or the Legislature authorized Respondents to promulgate emergency
19 retroactive interpretive regulations or retroactively rescind an interpretation it promulgated a year before.

20 79. On this issue, Respondents’ stated reason for the need to retroactively amend/rescind
21 Section 3700(i) is at best contrived given the factual and procedural history preceding the amendment.
22 As noted above, until *Catalyst/HNHPC expressed an intention to appeal the CDTFA’s excise tax*
23 *determination for Q1 and Q2 2023*, the CDTFA clearly did not believe any amendment to Regulation
24 3700 was required, or that Section 3700(i) had become obsolete in light of the enactment of RTC
25 §34011.2. Indeed, the CDTFA made amendments (not relevant here) to Section 3700 *after* enactment of
26 RTC §34011.2, but tellingly did not amend or seek to render “inoperative” Regulation 3700(i) until *after*
27 HNHPC stated its intent to appeal. Rather, when it became clear HNHPC would cite Section 3700(i) in
28

1 support of its appeal, the CDTFA initiated *secret and expedited* emergency actions (without notice to
2 anyone) to effectively rescind Section 3700(i) so it could not later be used against it by HNHPC or others.
3 That is neither a valid emergency nor the proper use of the rulemaking authority given to the CDTFA.
4 And to the extent that the OAL required CDTFA during the approval process to amend Regulation
5 3700(i) because it conflicted with Regulation 3802, it acted improperly as its recourse in that instances
6 was to disapprove Regulation 3802 and required CDTFA to “go back to the drawing board.” Yet instead
7 it colluded with the CDTFA to approve the two amendments without public notice or input, and even
8 agreed to *alter* the official rulemaking filed to try to conceal what they had done.

9 80. Finally, the enactment of RTC §34011.2 – the stated reason for the need to retroactively
10 nullify Regulation 3700(i) – objectively had no factual or legal bearing on the applicability or
11 interpretation of Regulation 3700(i); nor did RTC §34011.2 establish, discuss or authorize (explicitly or
12 implicitly) any change in substantive cannabis excise tax policy. For instance, RTC 34011.2(a)(1)
13 expressly provides “a cannabis excise tax shall be imposed upon purchasers of cannabis or cannabis
14 products” at “15 percent of the gross receipts of any retail sale by a cannabis retailer.” *See* RTC
15 §34011.2(a)(1). This sentence is fully consistent with Regulation 3700(i), and notably has two express
16 limitations which are significant to the present case.

17 81. The voters and the Legislature both made clear the CTL was imposing a *cannabis* excise
18 tax, not a general excise tax on all retail sales by cannabis retailers. As such, the cannabis excise tax was
19 imposed *solely* on purchasers of “cannabis and cannabis products” (both expressly defined terms) and
20 *not* on purchasers of cannabis accessories (also a defined term). When RTC §34011.2(a)(1) is read in
21 context, “gross receipts of any retail sale” clearly is meant to refer *only* to the sale of cannabis or cannabis
22 products, *not* the entire retail sale regardless of what is purchased. Significantly, and as discussed below,
23 not even the CDTFA purports to interpret RTC §34011.2(a)(1) to impose a cannabis excise tax on *all*
24 *items* purchased in a cannabis retail transaction. So if that section was *not* intended to impose an excise
25 tax on *everything* – as admitted by the CDTFA in Regulation §3802 – that merely confirms the clear and
26 unambiguous meaning of RTC §34011.2(a)(1) in that it imposes a 15% excise tax on the gross receipts
27 ***from the purchase of any cannabis or cannabis products***, and *nothing else*. *Webster v. Superior Court*
28

1 (2020) 51 Cal. App. 5th 676, 680 (If the statutory language is clear and unambiguous, the reviewer’s task
2 is at an end, since there is no need for judicial construction); *Skidgel*, 12 Cal. 5th at 10-11 (where
3 administrative interpretations are contrary to clear statutory language, they must be rejected).

4 82. In this regard, immediately after RTC §34011.2 went into effect, the CDTFA promulgated
5 a new interpretive regulation specifically addressing how the excise tax regime would work beginning
6 January 1, 2023 – 18 CCR §3800 (“Regulation 3800”). Therein, the CDTFA stated the following:

7 A cannabis excise tax is imposed upon purchasers of cannabis or cannabis products sold at retail
8 in this state on and after January 1, 2023, pursuant to Revenue and Taxation Code section 34011.2.
9 **The tax is 15 percent of the cannabis retailer’s gross receipts from the retail sale of the cannabis**
10 **and cannabis products to the purchaser on or after January 1, 2023**, and the cannabis retailer
is responsible for collecting the cannabis excise tax from the purchaser and remitting that tax to
the Department. (Emphasis added).

11 In short, between January 1, 2023 and October 12, 2023, Respondents *agreed* with HNHPC/Catalyst that
12 even under RTC §34011.2, excise tax applied *only* to gross receipts from the retail sale of cannabis and
13 cannabis products – which *does not include* the sale of cannabis accessories, as CDTFA now claims.

14 83. The purported need to retroactively rescind Section 3700(i) in light of RTC Code
15 §34011.2 also is not supported by any other statutory provisions of Prop 64. RTC §34011(e), as originally
16 enacted under Prop 64, RTC §34011(d) as amended by the Legislature, *and* Section 34011.2(f) *all* make
17 clear that cannabis excise taxation is limited to “gross receipts” upon “the sale of cannabis or cannabis
18 products,” and not on *all* sales made in a cannabis retail transaction. *See* RTC §34011.2(f) (“**Gross**
19 **receipts from the sale of cannabis or cannabis products** for purposes of assessing the sales and use taxes
20 . . . shall include the tax levied pursuant to this section”) (emphasis added). Simply put, if excise taxation
21 was *not* intended to be limited to sales of cannabis and cannabis products, as Respondents now claim,
22 these sections would not have been necessary, and certainly would not have been worded as they were.

23 84. The structure of Prop 64, as amended over time, also demonstrates the enactment of RTC
24 §34011.2(a)(1) was not intended to alter longstanding law and *for the first time* subject cannabis
25 accessories to excise taxation. As originally enacted, Prop 64 made the retailer responsible for the
26 remitting the excise tax, and did so using the same “gross receipts” language contained in RTC
27 §34011.2(a)(1). No one disputes that as originally enacted, separately stated and segregated cannabis
28

1 accessories were not subject to excise tax. Later, the Legislature amended Prop 64 to change the
2 remittance point from the retailer to the distributor. That change necessitated an amendment to RTC
3 §34011 to reflect the distributor’s need in certain cases to use a formula to reach anticipated gross receipts
4 of the retail sales – and so “gross receipts” in that instance was replaced with “average market price.”

5 85. When the remittance point statutorily was transferred back to the retailer as of January 1,
6 2023, the Legislature not surprisingly replaced the “average market price” language with the *original*
7 “gross receipts” language. Nothing more, nothing less. The CDTFA itself did not interpret the phrase
8 “15 percent of the average market price of any retail sale by a cannabis retailer” in the original RTC
9 §34011 to include everything purchased; rather, it properly interpreted that phrase as being limited to
10 cannabis or cannabis products as defined in Prop 64 and the CTL. That interpretation not only is correct,
11 but also clearly survived the enactment of RTC §34011.2. The Legislature was certainly aware of the
12 language and structure of Prop 64 and the CTL prior to enacting RTC §34011.2. It also was certainly
13 aware of the CDTFA’s interpretation (in Regulation 3700(i)) that cannabis accessories were *not* subject
14 to cannabis excise tax. Yet nothing in RTC §34011.2 even remotely suggests the Legislature intended
15 to alter the longstanding law excluding cannabis accessories from cannabis excise taxation.

16 86. Based on the foregoing, any claim by the CDTFA that it needed to rescind Section 3700(i)
17 on an emergency basis in light of RTC §34011.2 going into effect on January 1, 2023, is baseless,
18 contrived, and its conduct were arbitrary, capricious, in excess of its authority, in violation of required
19 notice and procedures, and fundamentally was legally improper.

20 **EMERGENCY REGULATION 3802 MUST BE INVALIDATED**

21 87. As alleged above, in September 2023, the CDTFA twice acknowledged in writing that
22 prior to January 1, 2023, if they were separately stated and substantiated, cannabis accessories legally
23 were not subject to the cannabis excise taxation, and HNHPC’s and Catalyst’s interpretation of that issue
24 under both Prop 64 generally and RTC Code §34011 specifically was legally correct.

25 88. In or around May 2023, with full knowledge of HNHPC’s and Catalyst’s interpretation,
26 the CDTFA initiated an audit of their Q1 and Q2 2023 sales and excise tax calculations. In or around
27 September 2023, the CDTFA rejected their interpretation for post-January 1, 2023 sales, notwithstanding
28

1 the fact HNHPC’s interpretation was fully consistent with Prop 64, RTC §34011.2, and the CDTFA’s
2 own interpretive regulations 3700(i) and 3800. When HNHPC and Catalyst notified the CDTFA it
3 intended to appeal its excise tax determination, the CDTFA, realizing it would *lose* under the clear
4 statutory language and its own *existing* interpretive regulations, fabricated a non-existent “emergency”
5 in order to eliminate its own problematic regulations and advance and replace them with a new and
6 baseless interpretation of the CTL’s excise tax provisions in order to defeat Catalyst’s expected appeal.³

7 89. More specifically, the CDTFA purported to seize on a non-existent ambiguity in RTC
8 §34011.2’s use of the phrase “gross receipts” to materially alter the CTL, to contravene the intent and
9 express language of RTC Code §34011.2(a)(1), and to establish via emergency regulation an entirely
10 new excise tax regime that far exceeds the CDTFA’s legal authority or discretion. Dispensing entirely
11 with the *statutory distinction* for excise tax purposes between cannabis and cannabis products, on the one
12 hand (taxable), and cannabis accessories on the other hand (non-taxable), the CDTFA via Regulation
13 3802 purported to make *everything purchased at a cannabis retail store subject to excise tax*, including
14 items wholly unrelated to cannabis as well as items expressly defined as non-taxable “cannabis
15 accessories.” See Regulation 3802(a). As the CDTFA purposefully and intentionally expanded the scope
16 and applicability of the statutory excise tax, altered the longstanding statutory provisions for calculating
17 the excise tax, and created an entirely new category of “property” not mentioned in or even remotely
18 suggested in the governing statutes, the CDTFA grossly overstepped, exceeded its authority and its own
19 prior regulations, and therefore Regulation 3802 must be invalidated. *Dyna-Med*, 43 Cal. 3d at 1389.

20 90. Incredibly, Respondents did not stop there. Not content with eliminating the statutory
21 exclusion for cannabis accessories *maintained and reaffirmed* in both the HSC and RTC §§34011 and
22 34011.2, and realizing any interpretation imposing excise tax on *everything and anything sold* would
23 summarily be rejected, Respondents purported *via emergency regulation* to invent an entirely new
24 category of property for purposes of assessing the cannabis excise tax – “Optional tangible personal
25 property.” See Regulation 3802(b). The apparent purpose was to ensure cannabis accessories *would be*

26 ³ On no notice and in violation of the APA and statutory emergency rulemaking procedures, Respondents
27 retroactively rescinded the interpretations contained in Regulation 3700(i). HNHPC is informed and believes
28 the CDTFA also is now undertaking similarly improper efforts to amend Regulation 3800(b) because it too is
fatal to its newly-contrived “interpretation” of the cannabis excise tax provisions.

1 *subject to excise tax*, without saying so directly. Stated differently, Respondents “butchered” the clear
2 and unambiguous intent *and* language of the CTL (as enacted by Prop 64 and subsequently amended) to
3 try to render illegal HNHPC’s and Catalyst’s *righteous* conduct and to *expand* the cannabis excise tax
4 far beyond their legal authority or the governing statutes and to effective subject non-taxable items to
5 cannabis excise taxation.

6 91. After Regulation 3802 was submitted to the OAL for review and approval, the Catalyst
7 Written Response was submitted to the OAL on behalf of Catalyst/HNHPC explaining the deficiencies
8 and improprieties of that regulation and urging the OAL to disapprove it. The OAL improperly rejected
9 and/or disregarded the matters raised in the OAL Letter, as well as numerous public comments submitted
10 to the OAL by the general public (including HNHPC/Catalyst). In the OAL Letter, HNHPC addressed
11 in detail the invalidity and impropriety of the CDTFA’s claim it was required to promulgate Regulation
12 3802 because the enactment of RTC §34011.2 changed the manner in which excise tax was assessed
13 and/or calculated. HNHPC refuted that contention by noting “gross receipts” had been part of the
14 governing law since the passage of Prop 64, and the statutory treatment remained unchanged even after
15 the passage of SB-94, AB-194, and enactment of RTC §34011.2 – and thus, contrary to the CDTFA’s
16 claims, there was no change in the governing law that would call into question the *uniformly accepted*
17 premise that cannabis accessories were *not* subject to excise tax so long as they were separately stated
18 from taxable cannabis and cannabis products. Simply stated, the CDTFA *invented* a non-existent
19 emergency to try to address, via a new “interpretive” regulation, an imaginary change in the law.

20 92. As noted above, the *only* changes of significance here via SB-94 and AB-195 were the
21 transfer of remittance point duties from the retailer to the distributor (SB-94) and then later transfer *back*
22 of those duties to the retailer. At all times, cannabis accessories, if segregated and separately stated, were
23 *not subject to cannabis excise tax*, and any claim to the contrary is false, contrived, and made in bad faith.

24 93. To add insult to injury, in its campaign to materially alter the CTL, CDTFA simply refuses
25 to conduct any legal analysis to substantiate its “interpretation” of RTC §34011.2(a)(1). That is, the
26 Notice is entirely devoid of any analysis or meaningful discussion of: (i) the framework of the CTL and
27 its own prior interpretations, (ii) the relevant statutory language, (iii) any of the defined terms of the CTL

28

1 that are used in RTC §34011.2(a)(1); (iv) any informative regulations or court decisions; or even (iv) the
2 taxability of “cannabis accessories”. Nevertheless, the CDTFA saw fit to promulgate the provisions of
3 Regulation 3802 that subjects tangible personal property to the cannabis excise tax, except for
4 “reasonable amounts charged” for “optional tangible personal property” with no explanation at all.

5 94. Because the CDTFA failed, in spectacular fashion, to even feign a legitimate attempt at
6 interpreting the statutory provisions of the CTL, the provisions of Regulation 3802 can only be classified
7 as “arbitrary, capricious [and without] reasonable or rational basis.” Moreover, Regulation 3802 not only
8 upends the uniform historical application of the CTL, it goes so far as to suggest the plain reading of
9 RTC §34011.2(a)(1) imposes cannabis excise tax on everything except for “reasonable amounts charged”
10 for “optional tangible personal property,” even though such terms are entirely foreign to both the CTL
11 and the RTC. For that reason, Regulation 3802 impermissibly alters and amends the CTL and
12 unjustifiably enlarges the scope of the statute it seeks to clarify without legislative authority. It is
13 therefore the court’s “obligation to strike down” Regulation 3802 in its entirety. See *Morris v. Williams*
14 (1967) 67 Cal.2d 733, 748 (“Administrative regulations that alter or amend the statute or enlarge or impair
15 its scope are void and courts not only may, but it is their obligation to strike down such regulations”).

16 **Regulation 3802 Fails to Satisfy the Legal Requirements of Government Code Section 11349.1**

17 95. In addition to being founded on a non-existent emergency and a knowingly false claim of
18 a change to the excise tax law under RTC §34011.2, Regulation 3800 also must be struck down because
19 Respondents failed to establish, and cannot establish, compliance with the six regulatory standards set
20 forth in GC §11349. Specifically, with respect to emergency regulations adopted pursuant to GC
21 §11346.1(b), such as here, GC §11349.6(b) states the “[OAL] shall disapprove the emergency regulation
22 if it determines the agency fails to meet the standards set forth in [GC §11349.1.]” Although the language
23 of GC §11349.1(a) directs the OAL to review the regulation for compliance with the six substantive
24 standards, courts have held that such language “does not defeat the authority of the superior court to
25 review regulations promulgated by an agency for compliance with those requirements.” *Sims*, 216 Cal.
26 App. 4th at 1080–81. As such, a court “may declare [a regulation] to be invalid” if it determines the
27 regulation “fails to meet the standards set forth in §11349.1.”

1 **Regulation 3802 Fails the Clarity Standard**

2 96. GC §11349.1(a)(3) requires regulations to comply with the “clarity” standard, which
3 means it is "written or displayed so that the meaning of the regulations will be easily understood by those
4 persons directly affected by them." Gov. Code §11349.1(c). In determining whether a regulation meets
5 this standard, a court may rely on provisions of OAL’s regulatory guidelines set forth in Cal. Code Regs.,
6 tit 1, §16, which in relevant part that “[a] regulation shall be presumed not to comply with the ‘clarity’
7 [requirement of Government Code §11349.1]” if, among other things:
8

- 9 (1) the regulation can, on its face, be reasonably and logically interpreted to have more
10 than one meaning; or
11 (2) the language of the regulation conflicts with the agency's description of the effect of
12 the regulation; or
13 (3) the regulation uses terms which do not have meanings generally familiar to those
14 “directly affected” by the regulation, and those terms are defined neither in the
15 regulation nor in the governing statute. *Sims v. Dep't of Corr. & Rehab.* (2016) 216
16 Cal. App. 4th 1059, 1080.

17 97. First and foremost, Regulation 3802 is riddled with “terms which do not have meanings
18 generally familiar to those ‘directly affected’ by the regulation, and those terms are defined neither in the
19 regulation nor in the governing statute.” One such term is “tangible personal property,” which is a term
20 neither defined in Regulation 3802 nor mentioned in the CTL. In addition, the term “tangible personal
21 property” has different meanings across different California statutes, including the Business and
22 Professions Code, the Sales and Use Tax Law, and the Probate Code⁴. Since the term “tangible personal
23 property” has multiple statutory meanings, and since the term is not defined in Regulation 3802 or in the
24 CTL, Regulation 3802 fails to comply with “clarity” standard under GC §11349.1.

25 98. In addition, Regulation 3802(a) states “‘gross receipts’ from the retail sale of cannabis or
26 cannabis products does not include a reasonable amount charged for optional tangible property.”

27 ⁴ See *Business and Professions Code §21627; Probate Code §6132(h); RTC §6016 (under the*
28 *Sales and Use Tax).*

1 However, the term “reasonable amounts charged” is not defined in Regulation 3802 nor mentioned in the
2 CTL and, by its nature, is inherently subjective and ambiguous. Furthermore, although Regulation
3 3802(b)(3) was modified (without notice) to establish “factors [the CDTFA] *may consider* in determining
4 whether the amount charged for optional tangible personal property is reasonable,” nothing in the
5 provision limits the CDTFA’s ability make arbitrary conclusions. Because the term “reasonable charge”
6 is vague, ambiguous, and inherently subjective, and because those “directly affected” would not
7 understand what constitutes a “reasonable amount charged” for purposes of imposing the cannabis excise
8 tax, Regulation 3802 fails to comply with the “clarity” standard under GC §11349.1.

9 99. Moreover, in the Notice, Regulation 3802(a) and (a)(1) provided that “gross receipts,” for
10 purposes of the cannabis excise tax, includes “[s]ervices that are part of the sale of cannabis and cannabis
11 products.” However, the phrase “services that are part of the sale of cannabis and cannabis products” is
12 neither defined nor clarified in Regulation 3802, the CTL, or the SUTL and provides no clarity as to
13 when services are subject to the cannabis excise tax. The OAL understood this and worked with the
14 CDTFA to modify Regulation 3802(a)(2) to include an example that would provide ‘clarity’ to the
15 provisions of Regulation 3802(a)(2) without input from the interested parties. The example added dealt
16 with the charging of a fee charged to the customer to reimburse the retailer for processing a credit card
17 payment for the purchase of cannabis. However, had the CDTFA actually provided notice to interested
18 parties of this modification, the interested parties would have informed the CDTFA that the example does
19 little to clarify the meaning of the phrase since it conflicts 18 CCR §1641 (Credit Sales) and 18 CCR
20 §1643 (Debit Card Charges), which are regulations that govern when credit card and debit card charges
21 are subject to the sales and use tax. Not only does the phrase “services that are part of the sale of cannabis
22 and cannabis products” inherently unclear as it is neither defined nor clarified in Regulation 3802, the
23 CTL, or the SUTL, the 13th hour modification to Regulation 3802 makes matters worse as it is an example
24 that directly contradicts 18 CCR §1641 (Credit Sales) and 18 CCR §1643 (Debit Card Charges). For that
25 reason, Regulation 3802(a)(2) fails to comply with the “clarity” standard under GC §11349.1.

26 100. Furthermore, Regulation 3802 fails to satisfy the ‘clarity’ standards because it uses
27 language in a way that “can, on its face, be reasonably and logically interpreted to have more than one
28

1 meaning.” For instance, Regulation 3802(a) provides that “gross receipts,” for purposes of the
2 cannabis excise tax, include “tangible personal property . . . the purchaser is required to purchase as a
3 condition of the sale of the cannabis or cannabis products”. (Emphasis added). The phrase “condition of
4 the sale” is neither defined nor clarified in Regulation 3802 or the CTL and has multiple interpretations.
5 One interpretation is that “condition of the sale” means the retailer will not sell the customer the
6 cannabis or cannabis product unless the customer also purchases the tangible personal property.
7 Alternatively, “condition of the sale” reasonably and logically could mean the customer does not
8 benefit from a discounted price – i.e. “*sale*” – if they fail to satisfy the condition of the sales promotion.
9 Under the former, the customer cannot purchase cannabis and cannabis products without also
10 purchasing the “tangible personal property”, while the latter the customer could purchase the cannabis
11 or cannabis product without also purchasing the “tangible personal property,” but in that scenario
12 would not benefit from the promotional sale.

13 101. Because the phrase “condition of the sale” causes Regulation 3802 to “be reasonably
14 and logically interpreted to have more than one meaning,” Regulation 3802 fails to comply with the
15 “clarity” standard under GC §11349.1.

16 102. Finally, “[a] regulation shall be presumed not to comply with the ‘clarity’ standard” if
17 “the language of the regulation conflicts with the agency’s description of the effect of the regulation.”
18 In the Notice, the CDTFA claims Regulation 3802 “clarifies the meaning of the phrase ‘gross receipts
19 of any retail sale by a cannabis retailer’ as used in [RTC §34011.2(a)].” However, the phrase “gross
20 receipts of any retail sale by a cannabis retailer” does not appear in any of the provisions of Regulation
21 3802. Instead, Regulation 3802 repeatedly uses the phrase “‘gross receipts’ from the retail sale of
22 cannabis or cannabis product.”

23 103. Although the CDTFA’s description of the effect of the regulation was to clarify the
24 meaning of the phrase “gross receipts of any retail sale by a cannabis retailer,” the phrase, itself, never
25 appears in Regulation 3802. Moreover, absent the use of the phrase “gross receipts of any retail sale by
26 a cannabis retailer” in the provisions of Regulations 3802, it would be impossible for Regulation 3802
27 to have the effect of clarifying the meaning of the phrase “gross receipts of any retail sale by a cannabis
28

1 retailer” for purposes of RTC §34011.2(a). For that reason, Regulation 3802 fails to comply with the
2 ‘clarity’ standard because “the language of Regulation 3802 conflicts with the [CDTFA]’s description
3 of the effect of the regulation” as required by GC §11349.1(a)(3).

4 **Regulation 3802 Also Fails the Consistency Standard**

5 104. In order to comply with the APA, GC §11349.1(b) requires that all regulations satisfy
6 the ‘consistency’ standard set forth in GC §11349.1(a)(1), which is defined as “being in harmony with,
7 and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of
8 law.” GC §11349(d). Here, the provisions of Regulation 3802 provide that “gross receipts,” for
9 purposes of the cannabis excise tax, (i) includes “amounts the purchaser is required to pay to purchase
10 the cannabis or cannabis products, regardless of how the amount is denominated or labeled on the
11 invoice, receipt, or other document provided to the purchaser,” but excludes (ii) “a reasonable amount
12 charged for optional tangible personal property purchased with cannabis or cannabis products.”
13

14 105. According to the Notice, the CDTFA promulgated the entirety of Regulation 3802 on
15 the unsupported notion that “[RTC §34011.2(a)] . . . makes the ‘gross receipts of any retail sale by a
16 cannabis retailer’ the measure of tax.” However, the CTL and relevant regulations make clear that the
17 measure of tax, for purposes of the cannabis excise tax, is found in the phrase “gross receipts from the
18 retail sale of the cannabis and cannabis products.”
19

20 106. As previously discussed, shortly after the enactment of AB-195, the CDTFA
21 promulgated Regulation 3800(d) which provided in relevant part: “[the cannabis excise tax] is 15
22 percent of the cannabis retailer's gross receipts from the retail sale of the cannabis and cannabis
23 products sold to the purchaser on and after January 1, 2023. (Emphasis added.)
24

25 107. In addition, a cursory review of RTC §34011.2 itself reveals it utilizes “gross receipts
26 from the retail sale of cannabis and cannabis products” more frequently than “gross receipts of any
27 retail sale by a cannabis retailer.” RTC §34011.2(a)(3) (requiring the CDTFA to estimate the amount
28

1 of forgone cultivation revenue by projecting the estimated amount “as a percentage of gross receipts
2 from the retail sale of cannabis and cannabis products by cannabis retailers”); RTC §34011.2(f) (“Gross
3 receipts from the sale of cannabis or cannabis products” for purposes of assessing sales and use taxes).

4 108. Notably, the provisions of Regulation 3802 itself conspicuously ignore the phrase
5 championed by the CDTFA. Instead – and perhaps ironically – the CDTFA chose to use the phrase
6 “gross receipts from the sale of cannabis or cannabis products.”

7
8 109. As a matter of construction, the phrases “gross receipts of any retail sale by a cannabis
9 retailer” and “gross receipts from the retail sale of cannabis and cannabis products” are markedly
10 different. On the one hand, “gross receipts of any retail sale by a cannabis retailer” suggests all sales of
11 a cannabis retailer, including non-cannabis tangible property (whether or not “optional”) is subject to
12 cannabis excise tax. On the other hand, “gross receipts from the retail sale of cannabis or cannabis
13 product” suggests only sales of “cannabis” and “cannabis product” are subject to cannabis excise tax.

14
15 110. Because the plain meaning of the two phrases stand in directly opposition to each other,
16 a determination that “‘gross receipts of any retail sale by a cannabis retailer’ [is] the measure of tax”
17 immediately calls into question the meaning of the phrase “gross receipts from the retail sale of
18 cannabis and cannabis products” used in the CTL, Regulation 3800, and even Regulation 3802 itself.
19 As such, Regulation 3802 “[lacks] harmony with, and [is in] conflict with [and] contradictory to,
20 existing statutes, court decisions, or other provisions of law,” and the court should therefore invalidate
21 Regulation 3802 for failing to satisfy the ‘consistency standard’ of GC §11349.1(a)(4).

22 **Regulation 3802 Also Fails the Necessity Standard**

23
24 111. In the record of a rulemaking proceeding, an agency must state the specific purpose of
25 each regulatory provision and explain why the provision is reasonably necessary to accomplish that
26 purpose. The ‘necessity’ standard set forth in subdivision GC §11349(a) provides:

1 “Necessity” means the record of the rulemaking proceeding demonstrates by substantial evidence
2 the need for a regulation to effectuate the purpose of the statute . . . that the regulation implements,
3 interprets, or makes specific, taking into account the totality of the record. For purposes of this
4 standard, evidence includes, but is not limited to, facts, studies, and expert opinions.

5 112. In order to meet the ‘necessity’ standard of GC §11349.1, the record of the rulemaking
6 proceeding must include:

7 (1) a statement of the specific purpose of each adoption, amendment, or repeal; and

8 (2) information explaining why each provision of the adopted regulation is required to carry out
9 the described purpose of the provision. Such information shall include, but is not limited to, facts,
10 studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation,
11 or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert
12 opinion, or other information.

13 113. Regulation 3802 fails to satisfy the “necessity” standard because the CDTFA relies
14 exclusively on its “policies” and “conclusions” in explaining why the subdivisions (a)(2) and (b)(2) of
15 Regulation 3802 are necessary to carry out the described purpose of the provision.

16 114. To be sure, the Notice indicates Regulation 3802(a)(2) and (b)(2) are founded entirely
17 on the CDTFA’s “determinations” based on the “wording” of RTC §34011.2(a):

18 “The [CDTFA] revised [] subdivision (a)(2) to clarify that for purposes of the cannabis excise tax
19 “gross receipts” include any amount the purchaser is required to pay for tangible personal
20 property, including packaging, the purchaser is required to purchase as a condition of the sale of
21 the cannabis or cannabis products. This is because the [CDTFA] determined that those amounts
22 are required to be included in gross receipts based upon the terms of the retail sale and the wording
23 of subdivision (a) of RTC section 34011.2.” (Emphasis added).

24 “[T]he [CDTFA] revised renumbered subdivision (b)(1) of emergency Regulation 3802 so that it
25 now clarifies that for purposes of the cannabis excise tax, “gross receipts” from the retail sale of
26 cannabis or cannabis products does not include a reasonable amount charged for optional tangible
27 personal property. . . [t]his is because the [CDTFA] determined that RTC section 34011.2 does
28 not require charges for optional tangible personal property to be included in the gross receipts
from retail sales by cannabis retailers.” (Emphasis added).

115. Importantly, the words “tangible property”, “optional tangible property”, and
“reasonable amounts charged” are *nonexistent* in the CTL and are solely the product of the CDTFA’s
unexplained “determinations”. That is, the CDTFA does not even take the time or effort to analyze any
other relevant statute or regulation in support of its “determination” and the rulemaking record is

1 devoid of any facts, studies, expert opinion, or other information to support the CDTFA’s
2 “conclusions” in violation of 1 CCR§10(b)(2). As such, the court should invalidate Regulation 3802
3 for failing to satisfy the ‘consistency standard’ of GC §11349.1(1).

4 **HNHPC Has Legal Standing to Bring a Mandamus Action**

5
6 116. There is no plain, speedy or adequate remedy in the ordinary course of law available to
7 HNHPC, it has a substantial and direct beneficial interest in enforcing Respondents’ mandatory and/or
8 discretionary duties and/or correcting its abuses of discretion as it has been directly harmed by the
9 offending conduct alleged herein, and HNHPC legally is entitled to performance by the Respondents of
10 such duties and/or to the proper exercise of discretion under the correct legal interpretation of Prop 64,
11 the CTL and the APA. *See* Cal. Civ. Proc. Code §§1085(a), 1086; *Save the Plastic Bag Coalition v.*
12 *City of Manhattan Beach*, 52 Cal. 4th 155, 165 (2011) (“one who is in fact adversely affected by
13 governmental action should have standing to challenge that action if it is reviewable”); *Braude v. City*
14 *of Los Angeles*, 226 Cal. App. 3d 83, 87-88 (1990) (beneficial interest is assessed on a “common sense
15 rather than a merely technical approach,” and requires only that the petitioner have a “substantial
16 interest” in the outcome of the proceeding).

17 117. Via this Cause of Action, HNHPC seeks the issuance of a writ of mandate: (1)
18 invalidating the “emergency” amendment to Regulation 3700 and/or compelling the OAL to
19 *disapprove* it; (2) invalidating Emergency Regulation 3802 and/or compelling the OAL to *disapprove*
20 it; (3) prohibiting Respondents from formally implementing or taking any steps to enforce those
21 emergency regulations; (4) invalidating Respondents’ promulgation and approval of those emergency
22 regulations as being violative of their respective mandatory ministerial and legal duties to comply with
23 the law and governing legal authorities recited above; (5) compelling Respondents to act in conformity
24 with the governing law and under the correct interpretation of the law, and invalidating all actions that
25 might be considered discretionary on the grounds they were/are legally improper, violative of
26 governing law, and/or were arbitrary, capricious, without rational, factual or legal basis and thus
27 reversible abuses of discretion.
28

1 **SECOND CAUSE OF ACTION**

2 **INJUNCTIVE RELIEF**

3 (AGAINST ALL RESPONDENTS)

4 118. HNHPC incorporates as though set forth herein in full the allegations contained in
5 Paragraphs 1-117 above.

6 119. HNHPC seeks a preliminary and permanent injunction (a) compelling Respondents to
7 comply with their mandatory and/or discretionary legal duties vis-à-vis the formulation and
8 promulgation of interpretive regulations relating to cannabis excise taxation; (b) prohibiting them from
9 enforcing or acting in furtherance of the above-mentioned emergency regulations; (c) prohibiting them
10 from imposing or seeking to collect cannabis excise taxes on separately stated cannabis accessories; (d)
11 compelling the OAL to disapprove the challenged emergency regulations; and (e) compelling them to
12 properly interpret and apply Prop 64 and the CTL so as to exclude from cannabis excise taxation
13 separately stated and documented “cannabis accessories” as defined in HSC §11018.2; and (d)
14 prohibiting them from engaging in any effort to amend or rescind Regulation 3700, and specifically
15 3700(i), whether pursuant to emergency rulemaking or otherwise.

16 **THIRD CAUSE OF ACTION**

17 **DECLARATORY RELIEF**

18 (AGAINST ALL RESPONDENTS)

19 120. HNHPC incorporates as though set forth herein in full the allegations contained in
20 Paragraphs 1-117 above.

21 121. As noted above, an actual and justiciable controversy exists between HNHPC and
22 Respondents over the validity and enforceability of the December 15, 2023 emergency amendment to
23 Regulation 3700 and of Regulation 3802, as well as over whether “cannabis accessories” as defined in
24 Prop 64 and the CTL legally are subject to the cannabis excise tax. As such, HNHPC seeks the
25 following declaratory judgments from the Court: (a) that the emergency amendments to Regulation
26 3700, and Regulation 3802, are invalid and of no legal force or effect; (b) Respondent did not
27 substantially comply with the APA and governing emergency rulemaking provisions with respect to the
28

1 emergency amendment to Regulation 3700 and emergency Regulation 3802, and thus the OAL legally
2 was required to disapprove them; (c) under Prop 64 and the CTL, separately stated and documented
3 sales of cannabis accessories are not subject to the cannabis excise tax; and (3) the proper interpretation
4 and application of RTC §§34011 and 34011.2 vis-à-vis whether and under what circumstances (if any)
5 cannabis accessories are properly the subject of cannabis excise taxation.

6 **PRAYER FOR RELIEF**

7 WHEREFORE, based on the foregoing, HNHPC prays for the following relief:

- 8 1. For the granting of its request for peremptory writ of mandate as set forth above;
- 9 2. For the granting of the requested preliminary and permanent injunction requested above;
- 10 3. For the declaratory judgments requested above;
- 11 4. For the recovery of reasonable fees and costs, to the extent permitted by law; and
- 12 5. For such other or different relief as deemed necessary or appropriate by the Court; an

13 DATED: December 26, 2023

LAW OFFICE OF JEFF AUGUSTINI

14 *Jeff Augustini*
15 By: _____
16 JEFF AUGUSTINI

17 Attorneys for HNHPC Inc.
18
19
20
21
22
23
24
25
26
27
28

VERIFICATION

State of California, County of Fresno

I have read the foregoing **VERIFIED PETITION FOR WRIT OF MANDAMUS AND COMPLAINT** and know its contents.

I have been authorized by Petitioner and Plaintiff HNHPC, Inc., to make this verification for and on its behalf, and I make this verification for that reason.

I am informed and believe and on that basis allege that the claims, allegations and averments stated in the foregoing document are true based upon the information reasonably available to me.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 26, 2023, at Long Beach, California.



Elliot Lewis

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28