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Exempt from filing fees pursuant to Gov. Code, § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

COUNTY OF SANTA CRUZ, ET AL.,

Plaintiffs,

v.

BUREAU OF CANNABIS CONTROL; LORI AJAX, in her official capacity as Chief of the Bureau of Cannabis Control; and DOES 1 through 10, inclusive

Defendants.

Case No. 19CECG01224

DEFENDANTS' TRIAL BRIEF

Dept: 403
Judge: Hon. Rosemary T. McGuire
Trial Date: July 16, 2020
Action Filed: April 4, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

The Control, Tax and Regulate Adult-Use of Marijuana Act ("Proposition 64") mandated the licensing agencies, including the Bureau of Cannabis Control[1] ("Bureau") to promulgate regulations effectuating the purpose and intent of the initiative measure. (Bus. & Prof. Code, §§ 26013 and 26014.)[2] In 2017, Proposition 64 and the Medicinal Cannabis Regulation and Safety Act ("MCRSA") were combined into the Medicinal and Adult-Use Cannabis Regulation and Safety Act ("MAUCRSA"), consolidating the state's medicinal and adult-use cannabis regulatory systems. (Sen. Bill No. 94 (Reg. Sess. 2017-2018) § 4, Bus. & Prof. Code, § 26000 et seq.).[3]

From 2016 to 2018, the Bureau drafted and issued emergency regulations, received public comments in writing and held public hearings for people to provide oral comments as part of the rulemaking process. The Bureau issued final regulations setting forth the requirements for the licensing and operations of commercial cannabis businesses engaged in retail sales, distribution, testing, microbusiness, and temporary events. (AR000001-000138.)[4] The final regulations, adopted on January 16, 2019, included comprehensive regulations that contained rules for the licensing and implementation of commercial cannabis businesses, including the retail delivery of cannabis[5] to consumers, the regulation at issue in this matter. (Cal. Code Regs., tit.16, § 5416; AR 000065.) Through Proposition 64, the voters made it lawful throughout the state for adults to possess and purchase cannabis, while otherwise preserving a level of local control over commercial cannabis activities. (Plaintiffs' RJN, Ex. 46 [Ballot Pamp., Primary Elec. (Nov. 8, 2016) text of Prop. 64, pp. 180, 197]; Health & Saf. Code, § 11362.1 et seq.; Bus. & Prof. Code, §§ 26055, subd. (e), and 26200; Cal. Code Regs., tit. 16, § 5416; AR000065-66.) Based on this balancing of interests, the Bureau promulgated the following regulation for delivery of cannabis:

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[1] Referred to as the "Bureau of Marijuana Control" in Proposition 64, and later renamed as a result of Senate Bill 94 in 2017.

[2] All references are to the Business and Professions Code, unless otherwise indicated.

[3] The consolidation included changing "marijuana" to "cannabis" in all statutes.

[4] The Administrative Record is referenced as "AR" followed by the page number.

[5] The term "cannabis" is used to refer to cannabis flower and products containing cannabis.

§ 5416. Delivery to a Physical Address

(a) A retailer may only deliver cannabis goods to a physical address in California.

(b) A retailer delivery employee shall not leave the State of California while possessing cannabis goods.

(c) A retailer shall not deliver cannabis goods to an address located on publicly owned land or any address on land or in a building leased by a public agency. This prohibition applies to land held in trust by the United States for a tribe or an individual tribal member unless the delivery is authorized by and consistent with applicable tribal law.

(d) A delivery employee may deliver to any jurisdiction within the State of California provided that such delivery is conducted in compliance with all delivery provisions of this division.

(e) A delivery employee shall not deliver cannabis goods to a school providing instruction in kindergarten or any grades 1 through 12, day care center, or youth center.

(Cal. Code Regs., tit. 16, § 5416; AR 001299.)

The Plaintiffs in this case are challenging only subdivision (d) of California Code of Regulations, title 16, section 5416 (Delivery Regulation), which allows cannabis to be delivered by a licensed retail commercial cannabis business "to any jurisdiction within the State of California provided that such delivery is conducted in compliance with all delivery provisions …" (*Ibid*.) This Court should:

1) Decline to issue a declaration in this matter because no actual controversy exists between the parties; and

2) Deny declaratory and injunctive relief in this "facial" challenge because the Bureau had authority to promulgate the Delivery Regulation, and the regulation is consistent with and necessary to effectuate the purpose of MAUCRSA.

As detailed below, the Delivery Regulation is based on the plain language of MAUCRSA, which states that "[a] local jurisdiction shall not prevent delivery of cannabis or cannabis products" by licensees acting in compliance with state and local law. (Bus. & Prof. Code, § 26090, subd. (e).) In the regulation, the Bureau merely recognized that the Legislature meant what it said, a conclusion that is supported by the overall structure and purpose of the statute as well as the repeal of a statute granting local jurisdictions the authority to prohibit deliveries of

medicinal cannabis. (see Former Bus. & Prof. Code, § 19340.) Indeed, Plaintiffs are able to challenge the Delivery Regulation only by ignoring the structure, purpose, and history of MAUCRSA and urging this Court to reach the bizarre conclusion that a statute stating that local jurisdictions "shall not prevent delivery of cannabis or cannabis products" actually gives local jurisdictions unfettered power to ban such deliveries.

LEGISLATIVE HISTORY

Cannabis was first legalized in California in 1996 and focused on medicinal patient access through Proposition 215, also known as the Compassionate Use Act (CUA). For twenty years, medicinal cannabis cultivators and medicinal retailers were subject almost exclusively to the oversight and control of local jurisdictions. CUA created a limited statute with a narrow scope by giving "only qualified patients and their primary caregivers a defense to the state crimes of marijuana possession and cultivation when that possession or cultivation is for medical purposes." (*Conejo Wellness Center, Inc. v City of Agoura Hills* (2013) 214 Cal.App.4th 1534, 1554 (*Conejo*); Health & Saf. Code, § 11362.5.) The CUA also had a limited reach into local governmental affairs as it "never expressed or implied any actual limitation on local land use or police power regulation of facilities used for the cultivation and distribution of marijuana." (*City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 26 Cal.4th 729, 759-760.)

Control over cannabis regulation began shifting to the state level in 2004 when Senate Bill 420, the Medical Marijuana Program Act ("MMPA"), was passed. (Sen. Bill No. 420 (2003-2004 Reg. Sess.).) The central purpose of the bill was to resolve "uncertainties" created by disparate regulation and enforcement in various jurisdictions and to "promote uniform and consistent application of the act among the counties within the state." (*Id*. at § 1). As a result, the MMPA developed a state-directed program for the issuance of identification cards to qualifying medicinal cannabis patients. (Health & Saf. Code, § 11362.71 et seq.)

In 2015, control shifted even further to the state level when the Legislature passed the Medical Marijuana Regulation and Safety Act ("MMRSA"), implementing a statewide regulatory program for commercial medicinal marijuana activities. (Assem. Bill No. 243 (2015-

2016 Reg. Sess.) § 1; Assem. Bill No. 266 (2015-2016 Reg. Sess.) § 1; Sen. Bill No. 643 (2015-2016 Reg. Sess.) § 1.) MMRSA specifically provided that "[N]o person shall engage in commercial cannabis activity without possessing *both* a *state license* and a local permit license or other authorization." (Former Bus. & Prof. Code, § 19320, added by Stats, 2015, ch. 689, and repealed by Stats. 2017, ch. 27, § 2; emphasis added.) While MCRSA, which MMRSA became known as,[6] stated that it did not disturb the authority of local governments to exercise their police powers regarding cannabis, it had the effect of conditioning all local regulations on compliance with the new statewide regulatory scheme and restricted the activities that local jurisdictions could allow.

In 2016, state authority again expanded and local control correspondingly contracted when the people of California voted to legalize and regulate the adult-use of cannabis as part of Proposition 64, a statewide initiative. These sweeping changes to California law were intended to "establish a comprehensive system to legalize, control and regulate the cultivation, processing, manufacture, distribution, testing, and sale of non-medical marijuana." (Plaintiffs' RJN, Ex. 46 [Ballot Pamp., Primary Elec. (Nov. 8, 2016) text of Prop. 64, p. 179].) Proposition 64 guaranteed the right of Californians to possess, purchase, and obtain certain amounts of cannabis or cannabis products (Health & Saf. Code §11362.1, subd. (a)), but also reserved to local governments the ability to regulate, but not ban, adult-use cannabis activities (Health & Saf. Code §11362.1, subd. (b)), and to regulate, and even ban the commercial adult-use cannabis businesses within their jurisdictions (Bus. & Prof. Code, §§ 26055 and 26900).

The MCRSA and Proposition 64 were two separate regulatory programs for cannabis. MCRSA and Proposition 64 were consolidated into the MAUCRSA, creating a comprehensive and uniform state system of medicinal and adult-use cannabis regulations. (Sen. Bill No. 94 (2017-2018 Reg. Sess.) § 4.) Both the MCRSA and Proposition 64 had included provisions for the delivery of cannabis. However, the delivery provisions in the MCRSA and in Proposition 64

[6] The MMRSA became the Medicinal *Cannabis* Regulation and Safety Act ("MCRSA") pursuant to Senate Bill 837 (2015-2016 Reg. Sess.).

were different: MCRSA's delivery provision allowed local jurisdictions to ban retail deliveries[7] while Proposition 64 prohibited local jurisdictions from preventing deliveries and outlawing the purchase of cannabis.[8]

In consolidating MCRSA and Proposition 64 into a single comprehensive scheme, the Legislature repealed the section of MCRSA allowing local jurisdictions to ban delivery. Instead, it chose to adopt the guaranteed right to access and the express prohibition against local interference with retail deliveries found in Proposition 64. Accordingly, MAUCRSA provides that "[a] local jurisdiction shall not prevent delivery of cannabis or cannabis products on public roads by a licensee acting in compliance with this division and local law as adopted under Section 26200." (Bus. & Prof. Code, § 26090, subd. (e).)

ARGUMENT

This matter is not ripe for judicial review as the Plaintiffs have failed to allege any facts demonstrating that there is a current controversy that would be resolved, or any harm that would be avoided, by the relief requested. If this matter were ripe for review, the Plaintiffs would have to overcome the presumption of the challenged regulation's validity by demonstrating that there are no circumstances in which the regulation could be valid. Plaintiffs' effort to overcome that burden consists entirely of an interpretation of the authorizing statute that attempts to interpret the statute to do exactly the opposite of what it says. This interpretation should be rejected, and the Court should find the Delivery Regulation consistent with the authorizing statutes and necessary to effectuate the purpose and intent of the regulatory scheme.

I. THE CASE IS NOT RIPE FOR JUDICIAL REVIEW BECAUSE NO ACTUAL CONTROVERSY EXISTS

Plaintiffs' complaint is founded on the supposition that, in a hypothetical conflict between one or all of their local policies and the Delivery Regulation, their local regulations would be

[7] Former Bus. & Prof. Code, § 19340, added by Stats, 2015, ch. 689, and repealed by Stats. 2017, ch. 27, § 2.

[8] Bus. & Prof. Code, §§ 26090 added by Initiative Measure (Proposition 64 § 6.1 approved Nov. 8, 2016, eff. Nov. 9, 2016 and Health & Saf. Code 11362.1 added by Initiative Measure (Proposition 64 § 4 approved Nov. 8, 2016, eff. Nov. 9, 2016.

uniformly preempted. But there is currently no dispute over the relationship between any of the Plaintiffs' specific ordinances and the Delivery Regulation. As such, the Court should decline to issue a declaration in this matter because no actual controversy exists between the parties.

The challenger of the validity of a regulation may bring a declaratory relief action against the state agency that adopted the regulation in accordance with the Code of Civil Procedure section 1060. (Gov. Code, § 11350, subd. (a).) However, under the Code of Civil Procedure section 1060, a party seeking a declaration of rights and duties with respect to another may only do so in cases where there is an "actual controversy relating to the legal rights and duties of the respective parties." (Code Civ. Proc., § 1060.) Courts therefore should decline to exercise their power where a "declaration or determination is not necessary or proper at the time under all the circumstances." (Code Civ. Proc., § 1061.) Declaratory judgments and injunctive remedies are discretionary, and "courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution." (*Pacific Legal Foundation v. Cal. Coastal Comm*. (1982) 33 Cal.3d 158, 171 ("*Pacific Legal"*).)

"[A] basic prerequisite to judicial review of administrative acts is the existence of a ripe controversy." (*Pacific Legal, supra,* at p. 169.) The ripeness doctrine prevents the courts from issuing purely advisory opinions or engaging in premature adjudication of abstract disagreements. (*Ibid*.) "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. [Citation.] It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts. [Citation]." (*Id.* at 170-171.) "A controversy is 'ripe' when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made." (*Cal. Water & Telephone Co. v. County of L.A.* (1967) 253 Cal.App.2d 16, 22.) "[T]he ripeness doctrine is primarily bottomed on the recognition that judicial decision-making is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy." (*Pacific Legal, supra*, 33 Cal.3d 158, 170.)

Plaintiffs' challenge to the Delivery Regulation is not ripe under the two-pronged test set forth by the California Supreme Court in *Pacific Legal*, which calls on a court to evaluate (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. (*Id*. at p. 171; see also *Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 540.)

A. This Case Is Not Ripe Because the Issues Are Not Fit for a Judicial Determination

Under the first prong of the *Pacific Legal* test, the issues here are not yet appropriate for judicial resolution due to the hypothetical nature of Plaintiffs' alleged injury. Notably, as was the case in *Pacific Legal*, "this proceeding is a facial challenge to the [Delivery Regulation] and nothing more" because Plaintiffs present their case only in the general sense, and no specific application of the Delivery Regulation to a set of facts is involved. (*Pacific Legal, supra,* 33 Cal.3d 158, 170.) Because no set of facts exist involving the application of the Delivery Regulation, this Court would be required to make substantial assumptions about events which may, or may not, occur at some future point. Specifically, Plaintiffs present the Court with twenty-five separate local ordinances and ask this Court to speculate about whether, in any hypothetical conflict between any one of the Plaintiffs and the Bureau, as well as potentially other unknown third parties, the Delivery Regulation would violate MAUCRSA.

Plaintiffs, by virtue of their specific ordinances, fall into three categories:

1) Plaintiffs that have a purely academic interest in the resolution of the Delivery Regulation's validity and no actual controversy because they either do not have an ordinance regarding commercial cannabis delivery (e.g., plaintiff City of Ceres[9]) or do not ban such delivery (e.g., plaintiff Angels Camp[10]);

[9] See Plaintiffs' RJN Exhibit 13: Ceres Municipal Code section 9.120.060 requires approval of a development agreement before any Commercial Cannabis Business can be established within the jurisdiction – the ordinance is specific to physical premises within the jurisdiction (see section 9.120.030.A) and makes no express or implied reference to delivery from outside the jurisdiction.

[10] See Plaintiffs' RJN Exhibit 3: Angels Camp Municipal Code section 5.10.050.

2) Plaintiffs that lack any sufficiently concrete controversy to bring before the Court because they allow delivery locally, but prohibit licensees from other jurisdictions from delivering to their residents (e.g., plaintiff County of Santa Cruz[11]), and there is no precise factual dispute about whether a specific business licensed in another jurisdiction may make deliveries there; and

3) Plaintiffs that have no ripe controversy, and for whom the issuance of declaratory relief regarding adult-use deliveries alone would not settle the question of whether their ordinances are subject to preemption because they ban *both* medicinal and adult-use deliveries into their jurisdictions (e.g., plaintiff City of Arcadia[12]).

In light of the lack of uniformity in local ordinances and the absence of any facts that have sufficiently congealed in this case, this Court cannot decide the validity of the Delivery Regulation because it is not "faced with a specific exaction." (*Pacific Legal, supra,* 33 Cal.3d 158, 170.)

Moreover, in what appears to be an attempt to create an actual controversy for this Court to decide, Plaintiffs refer to East of Eden Cannabis Co., a commercial cannabis business located in Salinas County, which filed a petition for writ of mandate against the plaintiff County of Santa Cruz (East of Eden Case) related to its delivery ordinance.[13] This case, however, was dismissed by the plaintiff on February 10, 2020. In addition, the particular facts of and the contentions made in the East of Eden Case are not before this Court, and "it would be improper to review and discuss them to support [this Court's] decision on the merits of the instant case." (*Pacific Legal,*

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[11] See Plaintiffs' RJN Exhibit 1: Santa Cruz County Code section 7.130.050 requires any retail licensee delivering cannabis within the County to have a local license. This would require a retail licensee in another jurisdiction to get a Santa Cruz County license before delivering cannabis.

[12] See Plaintiffs' RJN Exhibit 4: Arcadia Municipal Code section 9101.020.040(E)(4)(a) prohibits "transportation" as well as "delivery" of all "marijuana [and] marijuana products" whether adult-use or medicinal. The issue of whether a local jurisdiction can ban medicinal cannabis is not before the Court. MAUCRSA applies to medicinal and adult use cannabis, therefore any determination by the Court would leave open the validity of the Delivery Regulation as it relates to medicinal cannabis delivery.

[13] Defendants' object to Plaintiff's RJN Exs. 36 through 44 based on Government Code section 11350, subdivision (d) and Evidence Code sections 350-352, and 1200.

supra, 33 Cal.3d 158, 169; Govt. Code, § 11350, subd. (d) [describing scope of judicial review for declaration of invalidity of regulation to include the rule-making file and any evidence relevant to whether a regulation used by an agency is required to be adopted].)[14] Thus, this matter is not fit for a judicial decision in the absence of a precise factual context.

B. This Case is Not Ripe Because Plaintiffs Cannot Show Hardship Sufficient to Compel Declaratory and Injunctive Relief

Plaintiffs do not meet the requirements of *Pacific Legal*'s second prong. Plaintiffs will not suffer harm if the Court withholds its consideration at this time because none of the Plaintiffs have shown, or in fact could show, that they had suffered or were about to suffer an injury as a result of the Delivery Regulation or the manner in which delivery was or was not handled in the local jurisdiction. Neither the Plaintiffs' complaint nor their trial brief contains a single factual allegation that any of them would suffer any actual harm as a result of implementation and enforcement of the Delivery Regulation.

Even if Plaintiffs' claim that they might be adversely impacted if they exercised local control over delivery by either banning it outright or placing restrictions on delivery in their local jurisdictions, such claims are entirely speculative and not an "actual, present controversy." (*Pacific Legal, supra*, 33 Cal.3d 158, 172-175.) For these reasons, the Court need not consider the merits of the Plaintiffs' challenges to the Delivery Regulation because the issues raised are not "sufficiently concrete to allow judicial resolution." (*Id.* at 170.)

In the event this Court finds that this case is ripe for review, Plaintiffs' request for declaratory and injunctive relief must be denied for the reasons set forth below.

II. STANDARD OF REVIEW

A. The Delivery Regulation Is Presumed Valid and Can Be Set Aside Only on a Showing That the Bureau Clearly Overstepped Its Statutory Authority

A regulation "comes to the court with a presumption of validity." (*Assn. of Cal. Insurance Companies v. Jones* (2017) 2 Cal.5th 376, 389 (*ACIC*).) The burden is on the challenging party to demonstrate the invalidity of the regulation. (*Credit Ins. General Agents Assn. v. Payne* (1976) 16

[14] Defendants object to Plaintiffs RJN, Exhibits 36, 42, and 44.

Cal.3d 651, 657; *Cal. Chamber of Commerce v. State Air Resources Bd*. (2017) 10 Cal.App.5th 604, 620.) Where, as in this case, the Legislature has conferred on a state agency or officer the power to adopt regulations to carry out a statute, the question before a reviewing court is whether a challenged regulation is "consistent and not in conflict with the statute" and whether it is "reasonably necessary to effectuate the purpose of the statute." (Gov. Code, §§ 11324.1, 11342.2; Bus. & Prof. Code, §§ 26010, 26013, subd. (a); see also *ACIC, supra,* 2 Cal.5th at p. 396 [citing Gov. Code, § 11342.2].) Applying this standard, "courts recognize that the Legislature must be permitted to rely on the peculiar ability of an administrative agency to achieve continuous, flexible, and expert regulation …" (*Ralph's Grocery v. Reimel* (1968) 69 Cal.2d 172, 176.) A contrary view—where agencies are prevented from exercising their discretion and expertise to address emerging problems—would "suggest that the Legislature had little need for agencies in the first place [Citation]." (*ACIC, supra,* 2 Cal.5th 376, 398.)

The standard of judicial review depends on the nature of the regulation. "Quasi-legislative rules represent 'an authentic form of substantive lawmaking' in which the Legislature has delegated to the agency a portion of its lawmaking power." (*ACIC, supra,* 2 Cal.5th 376, 396, quoting *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10.) Because quasi-legislative rules "have the dignity of statutes, a court's review of their validity is narrow: If satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end [Citation]." (*ACIC, supra,* 2 Cal.5th 376, 397.)

In contrast, a court may have a somewhat more active role in reviewing a rule that is purely interpretive and "devoid of any quasi-legislative authority." (*ACIC, supra,* 2 Cal.5th 376, 396.) In that circumstance, the court must determine "whether the administrative interpretation is a proper construction of the statute[.]" (*Ibid*.) But a court does not approach even this question on a legal blank slate. While the court takes "ultimate responsibility" for construing the statute, it "accords great weight and respect to the administrative construction [Citation]." (*Id.* at p. 397.).) Even in reviewing a purely interpretive rule, the agency's view "matters a great deal …" (*Ibid*.)

As the court recognized in *ACIC*, agency rules often "defy easy categorization." (See *ACIC, supra,* 2 Cal.5th 376, 397; see also *Ramirez v. Yosemite Water Co*. (1999) 20 Cal.4th 785, 799.) As the California Supreme Court explained: "It may be helpful instead to imagine 'quasi-legislative' and 'interpretive' as the outer boundaries of a continuum measuring the breadth of the authority delegated by the Legislature." (*ACIC, supra,* 2 Cal.5th 376, 397.) "Thus, in certain circumstances, a regulation may have both quasi-legislative and interpretive characteristics — as when an administrative agency exercises a legislatively delegated power to interpret key statutory terms [Citation]." (*Ibid*.) Where a rule's category is not outcome determinative, a court may choose to apply the standard for purely interpretive rules, asking only whether the agency "has reasonably and properly interpreted the statutory mandate." (*Ibid*.) A rule that meets this standard must be upheld, no matter its category.

In this case, the Delivery Regulation is a "quasi-legislative" regulation subject to limited judicial review given the broad rule-making power provided by the Legislature under MAUCRSA to the Bureau to adopt implementing regulations. (Bus. & Prof. Code, §§ 26010, 26013, subd. (a).) This substantive lawmaking power granted to the Bureau is further illustrated by the Legislature's mandate that an Advisory Committee be created to "advise the licensing authorities on the development of standards and regulations pursuant to this division, including best practices and guidelines that protect public health and safety while ensuring a regulated environment for commercial cannabis activity that does not impose such barriers so as to perpetuate, rather than reduce and eliminate, the illicit market for cannabis." (Bus. & Prof. Code, § 26014, subd (a).)[15] The Legislature recognized the unique nature of this new complex and highly regulated industry by requiring the careful formation of a specialized Advisory Committee,

[15] The Legislature's mandate to the Advisory Committee is derived from Proposition 64. In passing Proposition 64, the voters authorized the convening of "an advisory committee to advise. . .on the development of standards and regulations. . .including best practices and guidelines that protect public health and safety while ensuring a regulated environment for commercial cannabis activity that does not impose such barriers so as to perpetuate, rather than reduce and eliminate, the illicit market." (Bus. & Prof. Code, § 26014, subd. (a).) In order to aid the licensing agencies in carrying out the quasi-legislative function of developing standards and regulations, the Advisory Committee was specifically required to be comprised of "subject matter experts" from the cannabis industry, local agencies, public health professionals, and regulatory bodies. (Bus. & Prof. Code, § 26014, subd. (b).)

consisting of members with diverse backgrounds and expertise, to provide input to the Bureau regarding the development regulations. (Bus. & Prof. Code, § 26014, subd (b).) In doing so, the Legislature provided the Bureau with enhanced technical knowledge and expertise tending to "suggest the agency has a comparative interpretive advantage over a court [Citation]." (*ACIC, supra,* 2 Cal.5th 376, 390.). Further, as the Administrative Record demonstrates, the Bureau exercised tremendous care regarding the promulgation of the Delivery Regulation, suggesting that "the agency's interpretation is likely to be correct." (*Ibid*.; Plaintiffs' RJN Ex. 53 pp. 15-21.)

Regardless of whether this Court determines that the Delivery Regulation is "quasi-legislative" or "interpretive" in nature (or a blend), the ultimate question is whether the agency has acted within the scope of the authority delegated to it by the Legislature. (Gov. Code, § 11324.1.) Most importantly, the Legislature has "delegated to an administrative agency the responsibility to implement a statutory scheme through rules and regulations, the courts will interfere only where the agency has clearly overstepped its statutory authority …" (*Ford Dealers Assn. v. Dept. of Motor Vehicles* (1982) 32 Cal.3d 347, 356.) Here, the Bureau acted within the scope of its authority by implementing the Delivery Regulation, which is consistent with and necessary to effectuate the purpose of MAUCRSA.

B. Plaintiffs Must Prove That the Delivery Regulation Cannot Be Applied Consistent with the Relevant Statutes in Connection with Their Facial Challenge of the Delivery Regulation

Because Plaintiffs are making a facial challenge to the validity of the Delivery Regulation, Plaintiffs can only prevail if the text of the Delivery Regulation, on its face, is inconsistent with the relevant statutes. (*PacifiCare Life & Health Ins. v. Jones* (2018) 27 Cal.App.5th 391, 403 (*PacifiCare*).) In the instant case, Plaintiffs contend that the Delivery Regulation is invalid "on its face" because it "conflicts with the very statute it is supposed to implement." (POB 9:4.) Plaintiffs do not challenge the Delivery Regulation as applied to the facts of any case. A facial challenge based on an asserted inconsistency with a statute "considers only the text" of the challenged regulation, "not its application to the particular circumstances" of this case. (*PacifiCare, supra*, 27 Cal.App.5th 391, 403, quoting *Today's Fresh Start, Inc. v. L.A. County Office of Education* (2013) 57 Cal.4th 197, 218 (*Today's Fresh Start*).)

Most importantly, "[a] facial challenge is 'the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [law] would be valid [Citation]." (*PacifiCare, supra,* 27 Cal.App.5th 391, 403.) This standard is "exacting." (*Today's Fresh Start, supra,* 57 Cal.4th 197, 218 [constitutional facial challenge].) The challenger must show that the challenged regulation "inevitably pose[s] a present total and fatal conflict' with applicable prohibitions [Citation]." (*T.H. v. San Diego Unified School Dist.* (2004) 122 Cal.App.4th 1276, 1281.) As discussed below, Plaintiffs cannot meet their burden to show that "no set of circumstances exists" under which the Delivery Regulation would be valid. (*PacifiCare, supra,* 27 Cal.App.5th 391, 403.) Consequently, the Court should reject Plaintiffs' analysis relating to the alleged impropriety of the Bureau's creation of the Delivery Regulation.

III. THE DELIVERY REGULATION IS CONSISTENT WITH AND DOES NOT CONFLICT WITH MAUCRSA AND IS REASONABLY NECESSARY TO EFFECTUATE THE PURPOSE OF MAUCRSA

A. Statutory Interpretation Supports Validity of the Delivery Regulation

The Delivery Regulation is presumed valid because the Legislature conferred on the Bureau broad authority to adopt the Delivery Regulation to carry out MAUCRSA. (Gov. Code, §§ 11324.1, 11342.2; Bus. & Prof. Code, §§ 26010, 26013, subd. (a); *ACIC, supra,* 2 Cal.5th 376, 396.) The Bureau set forth its interpretation of MAUCRSA in the Delivery Regulation, which is entitled to "great weight" and was adopted pursuant to the Administrative Procedure Act. (*ACIC, supra,* 2 Cal.5th 376, 397.) In reviewing MAUCRSA through a lens with considerable deference to the Bureau, this Court should find that the Delivery Regulation conforms with MAUCRSA based on the plain text of the statutes and reading the statutory framework as a whole. As discussed below, local control is not absolute in the context of licensed commercial cannabis delivery by a licensee to a consumer: MAUCRSA prohibits local jurisdictions from banning delivery by cannabis businesses that are licensed in other jurisdictions.

1. The Text of MAUCRSA Supports the Delivery Regulation

MAUCRSA prohibits local jurisdictions from preventing delivery by cannabis businesses that are properly licensed in other jurisdictions. Section 26200, subdivision (a)(1) recognizes that local jurisdictions have broad authority over businesses licensed by them:

> This division shall not be interpreted to supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate businesses licensed under this division, including, but not limited to, local zoning and land use requirements, business license requirements, and requirements related to reducing exposure to secondhand smoke, or to completely prohibit the establishment or operation of one or more types of businesses licensed under this division *within the local jurisdiction*.

(Bus. & Prof. Code, § 26200, subd. (a)(1), emphasis added.)

However, Section 26090, subdivision (e), clearly and plainly states that local jurisdictions "shall not prevent" deliveries by licensees:

> A local jurisdiction *shall not prevent delivery of cannabis or cannabis products on public roads by a licensee* acting in compliance with this division and local law as adopted under Section 26200.

(Bus. & Prof. Code, § 26090, subd. (e), emphasis added.)

To clarify the relationship between these provisions, the Bureau implemented the Delivery Regulation, which provides that a licensed entity "may deliver to any jurisdiction within the State of California provided that such delivery is conducted in compliance with all delivery provisions of this division." (Cal. Code Regs., tit.16, § 5416, subd. (d).)

In the Delivery Regulation, the Bureau interpreted section 26200, subdivision (a)(1), to permit local jurisdictions to prohibit the "establishment or operation" of commercial cannabis businesses "within the local jurisdiction." The Bureau interpreted this to mean that local governments can regulate and even ban any commercial cannabis businesses, including retail delivery businesses, that are established and operate *within* its borders. However, local jurisdictions cannot totally prevent businesses that are established and operate in other cities or counties from delivering into their jurisdictions because Section 26090, subdivision (e), expressly prohibits local jurisdictions from preventing delivery of cannabis on public roads by licensees that are complying with MAUCRSA and local law. Therefore, if a delivery by a licensed business begins in a jurisdiction where the business is licensed but ends in a jurisdiction that did not license the business, the latter jurisdiction cannot bar otherwise lawful delivery by a licensee. While local jurisdictions are prohibited from preventing delivery from nonlocal licensed businesses under section 26090, subdivision (e), the local jurisdictions are authorized to control licensees to the extent that they may reasonably regulate a cannabis delivery business having a

physical premises within their jurisdiction pursuant to their authority under Section 26200, subdivision (a)(1).

Sections 26200 and 26090 must also be read in conjunction with the entirety of the regulatory scheme. Among the other provisions of Proposition 64 is Health and Safety Code section 11362.1, which expressly prohibits state and local jurisdictions from barring persons 21 years of age or older from possessing, transporting, purchasing or obtaining not more than 28.5 grams of cannabis or 8 grams of concentrated cannabis. This statute unequivocally permits individuals at least 21 years of age to buy cannabis from a licensed business regardless of where the person resides. Therefore, local jurisdictions have no authority to interfere with a consumer transaction that otherwise complies with this statute and state law.

This conclusion is supported by MAUCRSA's overall goal of "establish[ing] a comprehensive system to control and regulate the cultivation, distribution, transport, storage, manufacturing, processing, and sale" of medicinal cannabis and adult-use cannabis. (Bus. & Prof. Code, §26000, subd. (b).) In light of this goal, local control cannot be reasonably interpreted to invade the state's authority to ensure a comprehensive, uniform, logical and practical commercial cannabis delivery system. Thus, the Bureau's interpretation of MAUCRSA is balanced and reasonable.

According to Plaintiffs, section 26090 does not mean what it says. In their view, while the provision expressly states that "[a] local jurisdiction shall not prevent delivery of cannabis or cannabis products," it actually gives local jurisdictions absolute and unfettered power to ban local deliveries. Plaintiffs base this bizarre reading on the reference at the end section 26090 to local laws adopted under section 26200. But they do not—and cannot—offer any reason why the Legislature would have stated at the beginning of section 26090, subdivision (e), that local jurisdictions "shall not prevent delivery" when it intended to allow local jurisdictions to totally ban delivery of cannabis. The Court should reject Plaintiffs' construction of section 26090 because "[w]ell-established canons of statutory construction preclude a construction [that] renders a part of a statute meaningless or inoperative." *(Copley Press, Inc. v. Super. Ct.* (2006) 39 Cal.4th 1272, 1285.) A statute cannot in the same breath state that "a local jurisdiction *shall not prevent*

delivery of cannabis" and that local jurisdictions may totally ban delivery of cannabis. If the Legislature truly had meant to recognize that local jurisdictions may ban deliveries, it could have done so plainly and simply by stating that "*a local jurisdiction shall not prevent delivery of cannabis or cannabis products, but deliveries can only be made in a city, county, or city and county, that does not prohibit it by local ordinance.*"[16] This is an internally contradictory sentence and would not be a reasonable construction of section 26090, subdivision (e), though it is the interpretation advanced by the Plaintiffs.

Nor can Plaintiffs evade this obvious and fatal defect in their interpretation by asserting that, in stating that local jurisdictions "shall not prevent delivery," section 26090 merely prevents local jurisdictions from barring licensed deliverers from driving through its jurisdictions. (POB., p. 10:9-12.) That construction cannot be reconciled with the ordinary meaning of the text, and it is even more dubious when the statutory definition of delivery, "the commercial transfer of cannabis or cannabis products to a customer" is considered. (Bus. & Prof. Code, § 26001, subd. (p).) Inserting this definition, Section 26090 provides that "A local jurisdiction shall not prevent [commercial transfer] of cannabis or a cannabis product [to a customer] on a public road." Plaintiffs do not even attempt to explain how this can be understood to merely prevent a delivery company from driving through a jurisdiction.

Finally, Section 26200 does not save Plaintiffs. It is unlikely that the Legislature would have drafted section 26090 to expressly state that local jurisdictions "shall not prevent delivery of cannabis or cannabis products" but then given them precisely that authority by referencing Section 26200 at the end. As the Supreme Court has recognized, "drafters of legislation 'do not. . .hide elephants in mouseholes.'" (*Cal. Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 261, quoting *Whitman v. American Trucking Assns., Inc.* (2001) 531 U.S., 457, 468.) In addition, while section 26200 recognizes that local jurisdictions may prohibit the establishment

[16] As detailed in subsection B below, this is what was said in former Business and Professions Code section 19340, subdivision (a): "Deliveries can only be made … in a city, county, or city and county that does not explicitly prohibit it by local ordinance." (Former Bus. & Prof. Code, § 19340, added by Stats, 2015, ch. 689, and repealed by Stats. 2017, ch. 27, § 2.)

and operation of businesses, this authority is expressly limited to businesses "*within the local jurisdictions*." (Bus. & Prof. Code, § 26200, subd. (a)(1), emphasis added.)

Thus, Section 26200 is easily reconciled with Section 26090 by interpreting the former to grant local governments authority to regulate and even ban any commercial cannabis businesses, including retail delivery businesses that are established and operate *within the local jurisdiction*, but not to ban or prevent businesses that are established and operate in other jurisdictions from making deliveries. In other words, if a delivery by a licensed business begins in a jurisdiction in which it is licensed but ends in another jurisdiction, section 26090 prohibits the other jurisdiction from banning the delivery, though the jurisdiction may ban businesses within the jurisdiction from making deliveries as well as impose reasonable regulations on deliveries under section 26200, subdivision (a)(1).

2. The Delivery Regulation Is Also Supported by the Structure of MAUCRSA and the Expressly Stated Purposes of Proposition 64

The conclusion that Section 26090 prohibits local jurisdictions from banning deliveries by businesses licensed in other jurisdictions is bolstered by the structure of MAUCRSA and the expressly stated purposes of Proposition 64. (*Horwich v. Super. Ct.* (1999) 21 Cal.4th 272, 276 ["we do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness [Citation.]."].)

MAUCRSA, which combined Proposition 64 with MCRSA, the earlier statute governing medical marijuana, provides local jurisdictions with explicit but limited authority over commercial cannabis activities. For example, Proposition 64 provided local jurisdictions explicit authority over adult-use commercial cannabis activities up to and including total bans on the formation of cannabis businesses within a local jurisdiction. (Plaintiffs' RJN, Ex. 46 [Ballot Pamp., Primary Elec. (Nov. 8, 2016) text of Prop. 64, p. 197].) The voters also reserved to local jurisdictions other specific regulatory power:

> 1) Local regulations can significantly limit the methods and location of personal cultivation;

2) Local laws can regulate the possession, purchasing, obtaining, or giving away cannabis "within a building owned, leased, or occupied by a … local government agency;" and

3) Local jurisdictions are free to pass laws that protect the right of individuals and private entities to "prohibit or restrict any of the actions or conduct otherwise permitted under section 11362.1 on the individual's or private entity's privately owned property."

(Health and Saf. Code, §§ 11362.2, subd. (b), 11362.4, subd. (g), 11362.45, subd. (h).)

MAUCRSA also contains express and implied limits on local regulatory authority. It provides that local jurisdictions "shall not prevent transportation of cannabis or cannabis products on public roads by a licensee" in compliance with the statute's requirements (Bus. & Prof. Code, § 26080, subd. (b)), and "shall not prevent delivery of cannabis or cannabis products on public roads by a licensee" in compliance with such requirements. (Bus. & Prof. Code, § 26090, subd. (e).) Even more fundamentally, MAUCRSA states that it "shall not be unlawful under … local law to … purchase [or] obtain" cannabis or cannabis products. (Health & Saf. Code, § 11362.1, subd. (a).)

The personal rights that are protected and the purposes and intent of Proposition 64 also imposed implied limitations on the exercise of local police power. As just noted, MAUCRSA unequivocally authorizes any individual at least 21 years of age to buy cannabis from a licensed business and state that such activity shall not be unlawful under "local law" no matter where the individual resides. Other implied limitations can be seen where exercise of local authority would be inimical to the express objectives and policy goals of Proposition 64. Any local ordinance, whether ostensibly predicated on expressly granted authority or upon the inherent police powers of local jurisdictions, is void if it violates the express limits on the exercise of local police power or if it subverts or obstructs a policy objective of the Proposition 64.

The objectives of Propositions 64, set out in Section 3, include taking the "production and sales out of the hands of the illegal market and bring them under a regulatory structure," reduction of "barriers to entry into the legal, regulated market," creation of a thriving commercial marketplace that would "[g]enerate hundreds of millions of dollars in new state revenue annually for restoring and repairing the environment, youth treatment and prevention, community

investment, and law enforcement," and the right for adults to "use, possess, purchase, and grow cannabis." (Plaintiffs' RJN, Ex. 46 [Ballot Pamp., Primary Elec. (Nov. 8, 2016) text of Prop. 64, pp. 179-180].) All of these objectives would be totally obstructed if local jurisdictions could unilaterally impede statewide commercial activity. When "otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." (*O'Connell v. Stockton* (2007) 41 Cal.4th 1061, 1067; see also *T-Mobile West LLC. v. City and County of S.F.* (2019) 6 Cal. 5th 1107, 1123 "[A] local law would be displaced if it hinders the accomplishment of the purposes behind state law."].)

Permitting local jurisdictions to ban all deliveries of cannabis products would turn this structure on its head. If local jurisdictions were permitted not only to prohibit the establishment and operation of businesses within their jurisdiction, but also to ban businesses licensed to operate in other jurisdictions from delivering cannabis, the expressly recognized right of individuals in that jurisdiction to purchase cannabis in spite of local laws would be severely undercut. This is especially true in large counties such as Inyo or San Bernardino, which encompass more than 10,000 and 20,000 square miles respectively, where, as a practical matter, many consumers may be unable to drive to another jurisdiction permitting cannabis businesses.

Permitting local jurisdictions to ban all deliveries of cannabis also would undermine the stated objectives of Propositions 64. The proposition was intended to create a "comprehensive system to legalize, control and regulate … nonmedical marijuana." (Plaintiffs' RJN, Ex. 46 [Ballot Pamp. Primary Elec. (Nov. 8, 2016) text of Prop. 64, p. 179].) Its stated objectives include not only securing the right of adults to "use, possess, purchase, and grow cannabis," but also taking the "production and sales out of the hands of the illegal market and bring[ing] them under a regulatory structure." (*Id.* pp. 179-180.) These objectives would be undercut if local jurisdictions could unilaterally impede statewide commercial activity. For example, if whole swaths of the state could totally outlaw commercial cannabis transactions, the right of access guaranteed by Proposition 64 would become effectively meaningless in those areas. Similarly, if legal transactions were not allowed in those jurisdictions, only illicit sales would occur there, the

illicit market would be perpetuated, and the goal of creating a legally regulated, statewide commercial cannabis market would be sabotaged.

B. The Legislative History Confirms the Interpretation Underlying the Delivery Regulation

The Delivery Regulation is also supported by the legislative history of MAUCRSA and, in particular, the manner in which it resolved the differences between Proposition 64 and the MCRSA. As noted above, the MCRSA, which was enacted in 2015, permitted the use of cannabis for medicinal purposes but left cannabis regulation primarily to local jurisdictions. In particular, while the MCRSA prohibited local jurisdictions from banning "carriage" of medical cannabis on public roads, it permitted deliveries only in jurisdictions not explicitly prohibiting such deliveries:

> (a) Deliveries, as defined in this chapter, can only be made by a dispensary and in a city, county, or city and county that does not explicitly prohibit it by local ordinance.
>
> (b) Upon approval of the licensing authority, a licensed dispensary that delivers medical cannabis or medical cannabis products shall comply with both of the following:
>
> (1) The city, county, or city and county in which the licensed dispensary is located, and in which each delivery is made, do not explicitly by ordinance prohibit delivery, as defined in Section 19300.5.
>
> …
>
> (f) A local jurisdiction shall not prevent carriage of medical cannabis or medical cannabis products on public roads by a licensee acting in compliance with this chapter.

(Former Bus. & Prof. Code, § 19340, added by Stats, 2015, ch. 689, and repealed by Stats. 2017, ch. 27, § 2.)

In sharp contrast, Proposition 64 guaranteed the right of all Californians to "obtain" and "purchase" adult-use cannabis and explicitly prohibited local jurisdictions from "preventing deliveries" by licensees acting in conformity with state and local regulations. (Plaintiffs' RJN, Ex. 46 [Ballot Pamp. Primary Elec. (Nov. 8, 2016) text of Prop. 64, pp. 180, 192].) Even more importantly, in consolidating Proposition 64's regulation of adult-use and MCRSA's medicinal

regulations into a single comprehensive scheme, the Legislature repealed former section 19340, the MCRSA provision permitting deliveries only in local jurisdictions not explicitly prohibiting such deliveries, and replaced it with the provision in Proposition 64, prohibiting local jurisdictions from banning deliveries. As a consequence, MAUCRSA now states that local jurisdictions "shall not prevent delivery of cannabis or cannabis products on public roads" by a licensee. (Bus. & Prof. Code, § 26090, subd. (e).)

If the Legislature had intended section 26090 to permit local jurisdictions to ban deliveries by licensees from other jurisdictions, it undoubtedly would have adopted (and revised) the language of the MCRSA provision permitting such local bans rather repealing that provision and replacing it with a totally different provision stating that local jurisdictions shall not prevent deliveries. Thus, in addition to contradicting the plain language of Section 26090, the structure of MAUCRSA, and its stated purposes, the Plaintiffs' interpretation is also directly contrary to the legislative history of the statute.

C. The Delivery Regulation Is Reasonably Necessary

In addition to being consistent with MAUCRSA, the Delivery Regulation is "necessary to effectuate the purpose of the statute." (Gov Code, § 11342.2.) Plaintiffs do not allege anywhere in their complaint or opening brief that the Delivery Regulation is not necessary to effectuate the purpose of Proposition 64 and section 26090 and thus presumably agree that the regulation *is* necessary to advance the purpose and intent of the statute. In any event, the necessity inquiry is confined to "whether the rule is arbitrary, capricious, or without rational basis, and whether substantial evidence supports the agency's determination that the rule is reasonably necessary." (*Western States Petroleum v. State Bd. of Equalization* (2013) 57 Cal.4th 401, 415.) The Delivery Regulation easily satisfies this requirement.

During the rulemaking process, the Bureau received public and written comment seeking clarification on cannabis delivery (AR002172 - 007833), including discussions at a number of the Advisory Committee meetings prior to August 20, 2018, when the Advisory Committee voted 13-

4, in support of the proposed Delivery Regulation, in its initial form.[17] The concerns expressed by interest groups, policy makers, and the public focused on two general categories. The first category related to the need for clarity for consumers and licensed businesses to enable them to participate in a functional statewide market. This was necessary because, absent this clarification, it would be difficult, if not impossible, to navigate the numerous laws and ordinances if compliance with state regulations also required compliance with the local rules in the 482 cities and 58 counties in California. (AR004304). The second category expressed the concern that "cannabis deserts" would result from the large numbers of local jurisdictions banning all cannabis retail activities. (AR002195.) If local jurisdictions can create obstacles to the implementation of a comprehensive statewide marketplace, they also can interfere with the express policy goals of Proposition 64 such as consumer access, the elimination of the illicit market, development of a thriving statewide industry, and generation of significant tax revenue. (AR002300 - AR002323, AR002504 - AR002509, AR002578 - AR002607, AR002756 - AR007884, AR007994 - AR009194, AR009228 - AR0010069.)

[17] Defendants' RJN, Ex. A, pp. 7, 9, and 12 [Cannabis Advisory Committee Meeting Minutes dated November 16, 2017: questions regarding delivery limits, whether delivery was for medicinal cannabis only, and the amount of product that could be carried by a delivery driver]; Defendants' RJN, Ex. B, pp. 16-17 [Cannabis Advisory Committee Meeting Minutes dated March 15, 2018: comments regarding needing more secured vehicles that can carry more product, not having limits on the price of what can be carried, un-enclosed vehicles or two-wheeled vehicles, clarification of the regulations to clearly require age verification of the recipient at the time of delivery, opportunity for deliverers to go into the elder care communities, allowing deliverers to rely on a doctor's recommendation, and doing everything to help patients]; Defendants' RJN, Ex. C, p. 4 [Cannabis Advisory Committee Meeting Minutes dated July 19, 2018: "illegal operations and unlicensed businesses such as delivery operations are the biggest issues in non-compliance right now … relaxing some of the barriers for businesses to enter the legal market will help combat the illicit market" and **"**from a local government perspective, there is no uniform code or ordinance for cities to follow; each jurisdiction tends to have their own way of going about permitting businesses and asked how can cooperation between cities be facilitated to share data and information so that a model ordinance or code can be created … it is needed because some aspects of compliance and enforcement should be standardized statewide."]; Defendants' RJN Ex. D, pp. 15-21 [Cannabis Advisory Committee Meeting Minutes dated August 20, 2018] the proposed delivery regulation stated: "A delivery employee may deliver to any jurisdiction within the State of California."
.

The Delivery Regulation addresses the first category of concerns by clarifying what retail delivery licensees are permitted to do in the framework of the regulations. Specifically, the Delivery Regulation was "amended to clarify that a delivery employee may deliver to any jurisdiction within the State of California provided that such a delivery is conducted in compliance with all delivery provisions of the regulations." (AR001572; Cal. Code Reg., tit. 16, § 5416, subd. (d).) It also deals with the second set of concerns by clarifying that local police power cannot be used to ban cannabis deliveries by properly licensed businesses: "Local jurisdictions have the ability to regulate commercial cannabis businesses operating in their jurisdiction. However, the Act does not allow a local jurisdiction to prevent delivery on public roads." (AR001107.)

Enacting the regulation was necessary not only to vindicate the expressly protected right of access, but also to clarify what retail delivery services are allowed to do in the context of the state's regulations without fear of administrative sanction from the Bureau. Plaintiffs' hyperbolic claim that the rulemaking record "exposes BCC's blatant disregard for the limitation imposed by the California Electorate on state level pre-emption of local control" (POB, p. 18:19 - 20) has no basis. In fact, the Delivery Regulation is necessary not just to ensure the viability of the statewide commercial market and advance the policy goals of Proposition 64, but to apprise licensees of the basic rules they must follow. There are several hundred jurisdictions in the state and their regulations are subject to frequent change. In fact, three of the ordinances in the Plaintiffs' RJN are no longer current[18] because they have been replaced by new local ordinances.[19]

The regulation is necessary because, without the assurance of the Delivery Regulation, licensed retailers would not know whether they could accept orders within the regions where they operate. The Bureau's actions in promulgating the Delivery Regulation were not arbitrary,

[18] See Plaintiffs' RJN Exs. 4, 15, and 27.

[19] See Defendants' RJN, Exs. F, G, H, and I.

capricious, or irrational. The Bureau acted reasonably and out of necessity in setting forth a regulation that provided necessary clarity in the area of cannabis delivery.[20]

IV. PLAINTIFFS FAIL TO SATISFY THEIR BURDEN TO ESTABLISH THAT THE DELIVERY REGULATION IS INVALID

In addition to arguing that the Legislature granted local jurisdictions authority to totally ban delivery in the same breath that it stated that they "shall not prevent delivery of cannabis" (Bus. & Prof. Code, § 29200, subd. (e)), Plaintiffs challenge the Delivery Regulation on other grounds. None are persuasive.

A. The Delivery Regulation Does Not Unlawfully Preempt Local Laws

The Plaintiffs assert that the Delivery Regulation is unlawfully preemptive of local law. (POB, pp. 38:6 - 40:4.) In support of this assertion, however, Plaintiffs rely on cases that are irrelevant here because they address the scope of local police powers within the framework of California's former medicinal marijuana scheme. (*Ibid*.) Plaintiffs contend that "Prop 64 did not chart new territory protecting local control. The California Constitution expressly reserves police power to local governments …. Accordingly, when the voters acted to preserve local control under Proposition. 64, they were protecting the status quo …." (POB, p. 38:8 -14). That is plainly wrong: Proposition 64 *did* chart new territory.

Indeed, the lines between local police powers and the general laws of the state were completely redrawn when Proposition 64 created and defined, for the first time, local control relating to adult-use cannabis. For example, after Proposition 64, every local ban on cultivation was invalidated to the extent it did not allow cultivation of six plants indoors or in accessory structures. (Former Health & Saf. Code, § 11362.2, subd. (b)(1), added by Initiative Measure (Prop. 64 § 4.5, and Amended by Stats. 2017, ch. 27 S.B. 94 § 130.) Likewise, all local ordinances prohibiting the possession or use of cannabis were invalidated. (Health & Saf. Code,

[20] Defendants' RJN Ex. E [Cannabis Advisory Committee Meeting Minutes dated June 28, 2019] the Delivery Regulation, after the comment periods and after the regulation was adopted, was reviewed and the Committee voted (14-1) to support the current version of the Delivery Regulation.

§ 11362.1 ["It shall not be a violation of state or local law, for persons 21 years of age or older to: (1) Possess, process, transport, purchase, obtain, or give away …. not more than 28.5 grams of marijuana."].) Unquestionably, Proposition 64 redrew "the general laws of the state," within the meaning of Article XI, section 7 of the California Constitution.

As discussed above, Proposition 64 and MAUCRSA expressly granted certain authorities to local jurisdictions and contained express limitations on the exercise of local authority. Additionally, local jurisdictions are subject to implied limitations because they may not pass any ordinance that either directly conflicts with a state law or undermines the purpose of a state statutory scheme. "A local ordinance contradicts state law when it is inimical or cannot be reconciled with state law." (*Sherwin Williams Co. v. City of L.A.* (1993) 4 Cal.4th 893, 897-9-8978.) Therefore, Plaintiffs' total bans on delivery by licensees from other jurisdictions are preempted and void.

B. Retail Delivery is Not an Area Traditionally Subject to Local Control

Plaintiffs also argue that the Delivery Regulation contradicts the California Constitution and a "long history in this State of local authority over police and land use matters of this sort." (POB, p. 40:3 - 4). It would, however, be an extremely unusual exercise of local zoning or police power to prevent deliveries on public roads of medicine from an online pharmacy, boxes of wine from a wine club, or a vaporizer from Amazon.com. Principles which prohibit the exercise of local police powers to regulate the operation of businesses that are situated in other jurisdictions or that interfere with interjurisdictional commerce are long established. A local jurisdiction has inherent power to determine appropriate uses of land *within* its jurisdiction (Plaintiffs' RJN, Ex. 46 [Ballot Pamp., Primary Elec. (Nov. 8, 2016) text of Prop. 64, p. 182]), but cannot make those same determinations for businesses outside of their jurisdictional limits. (See *City of Oakland v. Brock* (1937) 8 Cal.2d 639, 641.)

The two cases cited by Plaintiffs, *Conejo, supra,* 214 Cal.App.4th 153 and *People ex rel. Reuer v. Nestdrop, LLC* (2016) 245 Cal.App.4th 664, do not suggest otherwise. These cases, both of which predate MCRSA, Proposition 64 and MAUCRSA, are irrelevant to the Delivery Regulation because they involve the analysis of local zoning powers within the context of the

CUA and MMPA, not MAUCRSA. More significantly, those cases are inapplicable because they involved businesses physically located within the jurisdiction where local ordinances were being enforced.

The Delivery Regulation allows a licensee authorized under state law and the local regulations where the business has a physical premises to deliver to any other jurisdiction within the state. As is pointed out in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729 ("*Riverside"*), whether a local jurisdiction should allow store front retailers, *is* an area of local concern: "while some counties and cities might consider themselves well suited to accommodating medical marijuana dispensaries, conditions in other communities might lead to reasonable decision that such facilities … present unacceptable local risks and burdens" (*Id.* at 756.) However, delivery of consumer products from retailers located outside the jurisdiction is an entirely different matter that is ubiquitous in modern society. There is virtually no consumer product that cannot be purchased from a vendor without a physical premises in the jurisdiction where the consumer resides. While agricultural activities (cultivation), industrial activities (cannabis processing and manufacturing), and cannabis storefronts (retail) are areas that are subject to local zoning, planning, and police powers, delivery services are not subject to local land use control except where a delivery service has a physical premises in a particular local jurisdiction. Retail delivery of legal consumer products is not an area over which local governments have traditionally exercised control, and Plaintiffs cite no authority establishing such local control.

This conclusion is consistent with the traditional distribution of state and local authority. In analyzing the boundary between local police powers and the general laws of the state, the California Supreme Court framed the inquiry as follows:

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> The significant issue in determining whether local regulation should be permitted depends upon a 'balancing of two conflicting interests: (1) the needs of local governments to meet the special needs of their communities; and (2) the need for uniform state regulation.' That basic issue, in turn, may in a specific instance be fragmented into the component issues which combine to effect its resolution such as whether local legislators are more aware of and better able to regulate appropriately the problems of their areas, whether substantial geographic, economic, ecological or other distinctions are persuasive of the need for local control, and whether local needs have been adequately recognized and comprehensively dealt with at the state level. Certain areas of human behavior command statewide uniformity, especially the regulation of statewide commercial activities …

(*American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239,1267, quoting *Robins v. County of L.A.* (1966) 248 Cal.App.2d 1, 9.)

In applying the above balancing test to a local ordinance that expressly prohibits outside businesses from engaging in commercial transactions with and delivering products to private residents within the jurisdiction, such a local ordinance would be preempted by Proposition 64. As noted above, if local jurisdictions throughout the State could totally outlaw commercial transactions, only illicit market sales would occur in those jurisdictions and the illicit market supply chain would be perpetuated, the right of access guaranteed by voters would be undermined, and the objective of creating a statewide commercial cannabis marketplace would be sabotaged. The only thing weighing against these consequences in the above articulated balancing test is the supposed need of local jurisdictions to regulate retail deliveries. However, retail delivery is a pervasive, ordinary part of statewide commerce that is not inconsistent with customary land uses in any zoning designation in every jurisdiction within the state. There is nothing about the activity governed by the Delivery Regulation that implicates any "substantial geographic, economic, ecological or other distinctions are persuasive of the need for local control;" however, an assortment of local laws interfering or prohibiting lawful activities would unequivocally obstruct "statewide commercial activities" and the broader policy goals of Proposition 64.

Furthermore, the California Supreme Court has indicated that "when a statute or statutory scheme seeks to promote a certain activity and, at the same time permits more stringent local regulation of that activity, local regulation cannot be used to completely ban the activity or otherwise frustrate the statute's purpose." (*Great West Shows Inc. v. County of L.A.* (2003) 27

Cal.4th 853, 868.) Residents of ban jurisdictions could refrain from ordering from licensed delivery services and delivery businesses could decline to serve those residents, but the void of interjurisdictional commerce created by this situation will, as a practical matter, be filled by illicit market activity. Consequently, the cannabis bought and sold in those ban jurisdictions will be untaxed and untested. While a local jurisdiction can ban the formation of a cannabis business on physical premises within their boundaries, they cannot, as a matter of law, enact regulations that subvert the purpose and intent of Proposition 64.

Plaintiffs are seeking an order declaring that they have an absolute power to ban commercial cannabis activity. The Court must deny this request because it interferes with the right to purchase and obtain cannabis guaranteed by Health and Safety Code section 11362.1, obstructs the statewide public policy goals expressly stated in Proposition 64, and turns interjurisdictional commerce into a confusing morass of conflicting laws. (*American Finance Services Assn. v. City of Oakland, supra*, 34 Cal.4th 1239, 1252. ["The denial of power to a local body when the state has preempted the field is not based solely upon the superior authority of the state. It is a rule of necessity, based upon the need to prevent dual regulations that could result in uncertainty and confusion."]

C. Plaintiffs Fail to Offer Any Valid Reason Why the Rule is Inconsistent with Relevant Statutes

The burden is on the Plaintiffs to overcome the presumptive validity of the Delivery Regulation. (*ACIC, supra,* 2 Cal.5th 376, 389 and *Chamber of Commerce, supra*, 10 Cal.App.5th 604, 620.) In order to overcome this presumption, Plaintiffs must demonstrate that there are no circumstances under which the delivery regulation could be valid. (*PacifiCare,* supra, 27 Cal.App.5th 391,403.) Even though this is the fundamental requirement for prevailing in a facial challenge to a regulation, Plaintiffs have not expressly made this allegation. In their complaint and brief, the only thing that Plaintiffs have done is offer up an alternative construction of section 26090, subdivision (e). As shown above, Plaintiffs' interpretation is both internally contradictory and relies exclusively on a narrow reading of one subdivision (section 26200, subdivision (a)), while ignoring all other features of Proposition 64 and MAUCRSA.

Apart from offering an alternative reading of section 26090, subdivision (e), the only other arguments made by the Plaintiffs are baseless aspersions about the rulemaking process. First, they imply that there is something untoward about adding new provisions to permanent regulations that were not in the emergency regulations package.[21] In fact, the delivery regulation was one of hundreds of subdivisions added when permanent regulations were proposed. (AR001224-001383.) Second, Plaintiffs write that the Delivery Regulation was introduced with "striking timing, soon after SB 1302 died in the legislature." (POB, p. 19:12.) Plaintiffs' reliance on Senate Bill 1302 not passing does not help their cause because "[u]npassed bills, as evidence legislative intent, have little value." *(Dyna-med v. Fair Employment and Housing Com.* (1987) 43 Cal.3d. 1379, 1395; see also *People v. Anderson* (2002) 122 Cal.4th 767, 780: "legislative inaction is a weak indication of intent at best; it is generally more fruitful to examine what the legislature has done rather than what it has not done.")

As noted above, the Court's focus should be on the relevant legislative actions. Here, there are at least four legislative *actions* that the Court could look to discern the intent of the legislature and the voters. First, California voters enacted Health and Safety Code section 11362.1 which prohibits local ordinances that would make it unlawful for residents to "purchase" and "obtain" cannabis. Second, the voters enacted Section 26090 prohibiting local jurisdictions from preventing deliveries on public roads (subject to permissible local regulations). Third, the Legislature repealed and did not replace former Business and Professions Code section 19340, which authorized local jurisdictions to ban retail delivery of medicinal cannabis. Fourth, the voters enacted Business and Professions Code Sections 26013 and 26014 which delegated rulemaking powers to carry out the quasi-legislative function of developing regulations to implement, administer, and enforce Proposition 64 and MAUCRSA.

The Bureau acted within the scope of its delegated authority, adopting regulations and implementing a program to achieve the policy goals expressed in Proposition 64. The Bureau has reasonably and properly interpreted the statutory mandates found in sections 26013 and 26014,

[21] Plaintiffs' Complaint Paragraph 39 "Regulation 5416(d) suddenly appeared in the third rulemaking package."

and issued a regulation that is consistent with the authorizing statutes and is reasonably necessary to advance the purposes and intent of Proposition 64.

CONCLUSION

There has yet to be an actual controversy between any of the Plaintiffs and the Bureau over implementation or enforcement of the Delivery Regulation, so the Court should, in its discretion, decline to entertain the academic question posed by the Plaintiffs. However, if the Court exercises its jurisdiction over this question, the Court should find that the promulgation of the Delivery Regulation within the quasi-legislative authority delegated to the Bureau and consistent with and necessary to carry out the purposes and intent of MAUCRSA.

The Bureau's implementation of the regulation is entitled to great weight and must be upheld as consistent with the MAUCRSA's text, legislative history, and statutory purpose. Further, Plaintiffs have failed to show, and are unable show, that the Delivery Regulation cannot be applied in a manner that is consistent with MAUCRSA, as is required to prevail on a facial challenge. For all the reasons presented, Plaintiffs' request for declaratory and injunctive relief should be denied.

Dated: June 8, 2020

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