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Filing Fee Exempt
(Gov. Code § 6103)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

COUNTY OF SANTA CRUZ; CITY OF AGOURA HILLS; CITY OF ANGELS CAMP; CITY OF ARCADIA; CITY OF ATWATER; CITY OF BEVERLY HILLS; CITY OF CERES; CITY OF CLOVIS; CITY OF COVINA; CITY OF DIXON; CITY OF DOWNEY; CITY OF MCFARLAND; CITY OF NEWMAN; CITY OF OAKDALE; CITY OF PALMDALE; CITY OF PATTERSON; CITY OF RIVERBANK; CITY OF RIVERSIDE; CITY OF SAN PABLO; CITY OF SONORA; CITY OF TEHACHAPI; CITY OF TEMECULA; CITY OF TRACY; CITY OF TURLOCK; and CITY OF VACAVILLE,

Plaintiffs,

v.

BUREAU OF CANNABIS CONTROL; LORI AJAX, in her official capacity as Chief

Case No.: 19CECG01224

PLAINTIFFS' TRIAL BRIEF
(Code Civ. Proc., § 1060; Gov. Code, § 11350)

COMPLAINT FILED: April 4, 2019
TRIAL DATE: July 16, 2020
DEPARTMENT: 403

of the Bureau of Cannabis Control; and DOES 1 through 10, inclusive,

Defendants.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT.

By this action, twenty-four California cities and one county request that this Court declare that a regulation adopted by defendant Bureau of Cannabis Control ("BCC") conflicts with the very statute it is supposed to implement, Proposition 64, the "Control, Regulate and Tax Adult Use of Marijuana Act" ("Prop. 64" or "AUMA"). The regulation violates the "consistency" requirement in the Administrative Procedure Act ("APA") applicable to all state agency regulations and, therefore, should be declared invalid by this Court.

In approving Prop. 64 in 2016, California's voters *expressly* protected the existing regulatory authority of cities and counties over commercial cannabis activity:

> 26200. (a)(1) **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**.

(§ 26200, subd. (a)(1), bold added.)

Under Business and Professions Code section 26200,[1] localities may not be deprived of their regulatory power over cannabis businesses, including their authority to completely prohibit the operation of such businesses "within the local jurisdiction." It is hard, in fact, to imagine a more direct or sweeping prohibition on state-level preemption of local authority. But Prop. 64 went even further and confirmed that local regulatory authority extends *specifically* to cannabis *deliveries*:

> 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**.

(§ 26090, subd. (e), bold added.) Section 26090's incorporation and reference to Section

[1] All references to "Regulation" are to Title 16 of the California Code of Regulations. All references to "Section" are to the Business and Professions Code, unless otherwise indicated.

26200 ensured that local control over deliveries would remain fully insulated from state-level preemption.

The one and only "carve-out" from this sweeping protection for local authority is not a carve-out at all, but instead a straightforward measure to ensure that one locality's exercise of *its* local authority will not and cannot burden *other* localities, which might take a different approach. Prop. 64 provides that while a locality may regulate—and even prohibit—deliveries to addresses *within* its boundaries, it may not prevent transportation of cannabis *through* the jurisdiction on public roads. (*See* §§ 26080, 26090; Sections IV.A, V.B, *infra*.) The statutory scheme makes perfect sense. A city or county may regulate deliveries to addresses within its jurisdiction, but it may *not* prevent a delivery company from driving *through* its jurisdiction on a public road to make a delivery outside of that jurisdiction.

Given that: (1) Prop. 64 ushered in a sea change with respect to recreational cannabis use and the attendant business operations; (2) all cannabis activity remains illegal under the federal Controlled Substances Act;[2] and (3) municipalities have had long-standing and constitutionally protected police and land use power over such activities, Prop. 64's preservation of local control should not surprise. Yet, defendant BCC, in an aggressive effort to eliminate and preempt this local control, has promulgated a regulation, Title 16, section 5416(d) of the California Code of Regulations ("Regulation 5416(d)"), in plain derogation of the statute.

Regulation 5416(d) states: "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." (Regulation 5416(d)). Nevertheless, the BCC ploughed ahead with its unlawful regulation, forcing localities to accept all cannabis deliveries by state-licensed retailers, *irrespective* of local law to the contrary. (*See* Section IV.D, *infra*.)

[2] Cannabis remains classified as a controlled substance under federal law, 21 U.S.C. § 812(c)(10), and none of the state-level provisions alter the federal prohibition.

Pursuant to Sections 26200 and 26090, localities may regulate cannabis deliveries or "completely prohibit" them altogether. The voters meant what they said, and the BCC has no power to overrule them. Plaintiffs, a geographically and politically diverse set of California local governments, respectfully request that this Court declare Regulation 5416(d) invalid and ensure that local regulatory authority remains intact.

II. PROCEDURAL HISTORY.

A. This Action: Twenty-Four California Cities And One California County File Suit To Protect Their Authority To Regulate Cannabis Deliveries.

Plaintiffs filed this action under Government Code section 11350, subdivision (a), and Code of Civil Procedure section 1060.[3] Each Plaintiff alleges that it has adopted ordinances or resolutions regulating—or in some cases prohibiting—commercial cannabis deliveries within its jurisdiction. (Complaint, ¶ 5; *see also* RJN, Exs. 1 to 35.) Named as defendants are the BCC, an administrative agency of the State of California, and in her official capacity only, BCC Chief Lori Ajax. Plaintiffs pray for a judicial declaration that Regulation 5416(d) is invalid and may not be implemented or enforced. (Complaint for Declaratory and Injunctive Relief, filed in this Court on April 4, 2019.) The BCC answered, and the Court ultimately set a trial date of July 16, 2020.

B. *East of Eden v. County of Santa Cruz*: A Cannabis Delivery Service Sues the County of Santa Cruz for Regulating Its Deliveries.

Approximately three months after Plaintiffs filed this lawsuit, East of Eden Cannabis Co. ("East of Eden"), a commercial cannabis retailer licensed by the BCC, filed a Petition for Writ of Mandate and Verified Complaint for Declaratory Relief (the "Petition") naming the County of Santa Cruz (also a plaintiff in this action) as Respondent. (RJN, Ex. 36 [Petition for Writ of Mandate, filed July 12, 2019].) The Petition alleged that Regulation 5416(d) preempted Santa Cruz County's local authority to regulate deliveries within its jurisdictional boundaries.

[3] A person wishing to challenge a regulation adopted by a state agency may do so, as here, through a declaratory judgment action. (Gov. Code § 11350, subd. (a).)

East of Eden moved for a preliminary injunction. East of Eden argued that Santa Cruz County Code sections 7.130.050(c) and 7.130.110(F)(1), which do not completely ban cannabis delivery but require that any business delivering cannabis in unincorporated Santa Cruz County have a local license, were preempted by Regulation 5416(d).

The Santa Cruz Superior Court was required to review East of Eden's likelihood of success on the merits of its suit, i.e., the validity of Regulation 5416(d). The Superior Court found that East of Eden failed to show a probability of success on the merits, because Sections 26200 and 26090 "make clear that local control has been preserved by the State statutory scheme and that Santa Cruz County's ordinances do not conflict with State law, are not preempted, nor are they unconstitutional." (RJN, Ex. 37 [Santa Cruz Opp., filed September 5, 2019]; Ex. 38 [Order, filed September 18, 2019]).

The BCC then moved for, and was granted, Intervenor status in the East of Eden litigation. (RJN, Ex. 39 [BCC Motion to Intervene, filed November 18, 2019]). The BCC also asserted that it had authority to preempt local regulation concerning deliveries, and that Regulation 5416(d) was intended to do so and did so.[4]

East of Eden moved to dismiss its lawsuit on February 4, 2020, and the BCC followed suit on February 10, 2020. The Court granted both dismissals. (RJN, Ex. 42 [East of Eden Notice of Entry of Dismissal, filed February 6, 2020]; Ex. 44 [BCC Notice

[4] RJN, Ex. 39 (BCC Motion to Intervene, filed November 18, 2019) at 4 ("[Regulation 5416(d)], . . authorizes a licensed commercial cannabis retail business to deliver cannabis and cannabis products throughout the state, ..."); *see also* BCC Complaint-in-Intervention, ¶ 2, RJN, Ex. 40 ("The Bureau seeks a judicial declaration validating the Cannabis Delivery Regulation. The Court should permanently enjoin Santa Cruz County, Santa Cruz Administrative Office, Santa Cruz County Cannabis Licensing Office, and Samuel LoForti, Cannabis Licensing Manager, in his official capacity (Respondents) from enforcing local laws that violate the Cannabis Delivery Regulation."); ¶ 22 ("The Cannabis Delivery Regulation permits delivery by a state licensed commercial cannabis retailer to a physical address to any jurisdiction within the State of California as long as the licensee complies with MAUCRSA [the Medicinal and Adult-Use Cannabis Regulation and Safety Act] and its implementing regulations. Inconsistent with MAUCRSA and the Cannabis Delivery Regulation, the County Cannabis Codes prohibit commercial cannabis retailers licensed by the Bureau and other local jurisdictions from delivering in unincorporated Santa Cruz County, but allow delivery by commercial cannabis retailers licensed by the Bureau and Santa Cruz County.")

of Entry of Dismissal, filed February 13, 2020].)

III. STIPULATIONS REGARDING RECORD AND EVIDENCE.

Based on the narrow issue in dispute, which can be decided as a matter of law, the Parties agreed to a one-day trial and briefing schedule.[5] The Court's task under the APA involves comparing the language of the statutory provisions to that of the BCC regulation. If they are consistent, the BCC should prevail. If, however, they are not, Plaintiffs must be granted declaratory relief.

The controlling statutes and relevant legislative history establish that all relevant policy judgments were by California's voters, who voted to ensure that local control would remain free from preemptive state-level oversight. The voters decreed in passing Prop. 64 that local control, which began with the passage in 1996 Proposition 215 (the "Compassionate Use Act"), which legalized the use of *medicinal* cannabis in California, would remain inviolate. The voters decided in Prop. 64 that local control, by then in place for 10 years for medicinal cannabis, was more important than statewide uniformity. The BCC has no authority to overturn the voters' judgment on this important issue, and its effort to do so through Regulation 5416(d) is invalid.

IV. STATUTORY AND REGULATORY BACKGROUND.

A. The Voters Enact Sweeping Changes to State Law Concerning Recreational And Medicinal and Recreational Cannabis.

The federal Controlled Substances Act, 21 United States Code section 801, et seq., prohibits, with limited exception, the possession, distribution and manufacture of marijuana. (21 U.S.C. §§ 812(c), 841(a); 844(a).) In sharp contrast, California and several other states have charted a different path. Over the course of two decades, California has moved carefully and thoughtfully toward decriminalization of cannabis. (*See generally, City of Riverside v Inland Empire Patients Hlth. & Wellness Ctr. Inc.* (2013) 56 Cal.4th

[5] This same process was followed in *Association of California Ins. Companies v. Jones* (2017) 2 Cal.5th 376, 388 where the parties "agreed that the case could be tried based on the rulemaking file, written briefs, and oral argument, without the need for oral testimony."

729, 753; *City of Vallejo v. NCORP4, Inc.* (2017) 15 Cal.App.5th 1078, 1081-82.) As relevant here and further explained below, the voters ensured that Sections 26090 and 26200 could be amended only with a 2/3 vote of the Legislature, and only then to further its purposes.[6] Thus, not even the Legislature, much less an administrative agency like the BCC, may set its own policy objectives in the area of local authority over cannabis regulation.

As stated above, California's voters enacted Proposition 215, which decriminalized specified uses of medical cannabis, in 1996. (*See, e.g.*, Health & Saf. Code, § 11362.5.) The Legislature subsequently clarified Proposition 215 in the Medical Marijuana Program Act in January 2004, leaving the details of regulation of medical cannabis to local jurisdictions. (*See* Health & Saf. Code, § 11362.768, subds. (f) and (g).)

In 2015, the Legislature enacted three bills — AB 243 (Wood, ch. 688); AB 266 (Bonta, ch. 689); and SB 643 (McGuire, ch. 719) — that collectively addressed the cultivation, manufacturing, retail sale, transportation, storage, delivery and testing of medicinal cannabis in California. This regulatory scheme is known as the Medical Cannabis Regulation and Safety Act ("MCRSA"). (*See, e.g.*, §§ 19300-19360; Stats. 2015, ch. 688, § 3, repealed by Stats. 2017, ch. 27, § 2; Stats. 2015, ch. 689, § 4, repealed by Stats. 2017, ch. 27, § 2; Stats. 2015, ch. 719, § 7, repealed by Stats. 2017, ch. 27, § 2.)

Next, and as directly pertinent to this lawsuit, on November 8, 2016, California's voters approved Prop. 64, which, among other things, removed state-level criminal penalties for the recreational use of cannabis. (See Health & Saf. Code, §§ 11362.1-11362.45 [codifying in relevant part Prop. 64, § 4 (see RJN, Ex. 45.)].) Prop. 64 also established a two-tiered regulatory framework over commercial cannabis activity, providing for state and local regulation and mandating compliance with *both* levels. (See §§ 26000-26211 [codifying in relevant part Prop. 64, § 6 (see RJN, Ex. 45.].)

[6] Proposition 64, Section 10 (" ... Except as otherwise provided, the provisions of the Act may be amended by a two-thirds vote of the Legislature to further the purposes and intent of the Act.") (RJN, Ex. 45 at 65.)

The Legislature then enacted the Medicinal and Adult-Use Cannabis Regulation and Safety Act ("MAUCRSA"). (Stat. 2017, ch. 27, § 2 (Sen. Bill No. 94) (2017-2018 Reg. Sess.).) MAUCRSA attempted to unify the regulation, licensing and enforcement of medical and recreational cannabis activity. MAUCRSA emphasized that state law did not "supersede or limit existing local authority" for "enforcement of local zoning requirements or local ordinances, or enforcement of local license, permit, or other authorization requirements." (Sen. Bill 94, (2017-2018 Reg. Sess.) § 102, codified in relevant part at § 26200, subd. (a)(2).)

Next, on September 26, 2018, the Governor signed AB 2020, which amended Section 26200 to clarify local authority with respect to temporary public cannabis events. In previewing the legislation, the Legislative Counsel's Digest states that Prop. 64/AUMA "authorizes a person who obtains a state license under AUMA to engage in commercial adult-use cannabis activity pursuant to that license **and applicable local ordinances**." (RJN, Ex. 50 [AB 2020], bold added.) The Legislative Counsel's Digest of the bill further notes that under MAUCRSA, an applicant must "obtain a separate license for each location where it engages in commercial cannabis activity." (*Ibid.*) In short, the amendment expressly identifies and preserves local control. (*See* § 26200, subds. (a)(1), (a)(2), (e)(1)(D), (f).)

On July 1, 2019, the Governor signed AB 97, which addressed certain regulatory provisions under MAUCRSA. Again, the Legislative Counsel's Digest confirms dual levels of regulation, noting that both a state license and compliance with "applicable local ordinances" are required to engage in any commercial adult-use cannabis activity. (RJN, Ex. 54) Included among the amendments contained in AB 97 was one to Section 26055, subdivision (d), confirming that BCC "shall not approve an application for a state license under this division if approval of the state license will violate the provisions of any local ordinance or regulation adopted in accordance with Section 26200." (§ 26055, subd. (f) [local authorities to advise BCC of changes to local requirements].) Further, where a local jurisdiction advises BCC that an activity is contrary to local ordinance, BCC is

affirmatively required to deny any license application seeking to conduct such an activity locally. (§ 26055, subd. (g).) These amendments confirm the equal power and dignity accorded to local regulation.

The amendments also create a presumption running to BCC's benefit, to the effect that an applicant may be presumed to be in compliance with local provisions, where the locality has not otherwise informed BCC to the contrary. (§ 26055, subd. (g)(2)(D).) However, the existence of this presumption, which eases BCC's administrative monitoring burden with respect to tracking local law, expressly did *not* prevent the locality itself from continuing to require compliance with all local ordinances in connection with commercial cannabis activities:

> A presumption by a licensing authority pursuant to this paragraph that an applicant has complied with all local ordinances and regulations adopted in accordance with Section 26200 shall not prevent, impair, or preempt the local government from enforcing **all applicable local ordinances** or regulations against the applicant, nor shall the presumption confer any right, vested or otherwise, upon the applicant to commence or continue operating in any local jurisdiction **except in accordance with all local ordinances or regulations**.

(§ 26055, subd. (g)(2)(F), emphasis added.)

Collectively, these amendments confirm, consistent with Prop. 64, the supremacy of local control as it relates to statewide licensing. At every step, the statutes mandate that BCC ensure its licensing is limited to locally permitted cannabis activities.

B. <u>Local Governments Throughout The State Enact Local Ordinances Under Section 26200 Regulating Or Prohibiting Cannabis Deliveries.</u>

Pursuant to their preexisting authority, as further confirmed by Section 26200 of Prop. 64, multiple localities throughout California have regulated or prohibited cannabis businesses, including cannabis deliveries, within their boundaries. According to the Senate Committee on Governance and Finance:

> Using the authority granted by [Prop. 64], most local governments in the state have banned the delivery of either medical cannabis or recreational cannabis. Specifically, according to CannaRegs.com, a company that tracks local cannabis ordinances across the United States, 333 cities and counties in California ban the delivery of both medical and recreational

> cannabis, and an additional 72 ban one or the other—totaling 75% of all municipalities in California."

(RJN, Ex. 49 [Sen. Rules Com., Off. Of Sen. Floor Analyses, Analysis of Sen. Bill No. 1302 (2017-2018 Reg. Sess.), at 4.)

Plaintiffs here are among those localities that have passed such ordinances. Attached as Exhibits 1 to 35 to Plaintiffs' RJN are the current pertinent delivery ordinances, resolutions, codes, or laws passed within each Plaintiff jurisdiction.

C. In View Of Prop. 64's Strong Protection For Local Control, The Legislature Backs Away From An Amendment That Would Have Targeted Local Regulatory Authority Over Deliveries.

Prop. 64 includes strict provisions limiting the scope of its future amendment. Only those amendments that will "implement" its provisions and be consistent with its "purposes and intent" are authorized on majority vote by the Legislature. (§ 26000, subd. (d).) Amendments that go beyond mere implementation but that are still consistent with Prop. 64's purpose and intent require a super-majority – a two-thirds vote. (RJN, Ex. 45 [Prop. 64, § 10].) Perhaps for this very reason, the Legislature has *never* acted to constrain local control.

It considered doing so, but the effort was soon scuttled in view of the express restriction on statewide preemption. During the 2017-18 legislative session, Senator Ricardo Lara introduced Senate Bill 1302, entitled "Cannabis: local jurisdiction: prohibitions on delivery," which would have prohibited local jurisdictions from banning delivery of commercial cannabis within their boundaries.[7] This effort at mandating statewide standards for delivery failed, as the bill was placed in the inactive file by Senator Lara on May 31, 2018. (RJN, Ex. 48 [California Legislative Information, Bill Information, Sen. Bill 1302 (Lara) (2017-2018 Reg. Sess.) History File].)[8]

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[7] Senate Bill 1302 states: "… (h) A local jurisdiction shall not adopt or enforce any ordinance that would prohibit a licensee from delivering cannabis within or outside of the jurisdictional boundaries of that local jurisdiction."

The bill's legislative history reveals grave concern that it improperly countermanded Prop. 64. The Senate Floor Analysis expressed these doubts, noting "most local governments in the state" have restricted cannabis deliveries under their "authority granted by [AUMA]," and confirming that [AUMA] [g]rants local governments wide latitude to regulate commercial cannabis activity within their jurisdictions." (RJN, Ex. 49 [Sen. Rules Com., Off. of Sen. Floor Analyses, 3d Reading Analysis of SB No. 1302 (2017-2018 Reg. Sess.), as amended April 26, 2018 at 2, 4].).[9]

The Legislative Counsel also "keyed" SB 1302 as requiring a two-thirds vote in each house, since the elimination of local authority over delivery amounted to an amendment (and not the mere "implementation") of Prop. 64. (RJN, Ex. 49 [Sen. Rules Com., Off. of Sen. Floor Analyses, 3d Reading Analysis of SB No. 1302 (2017-2018 Reg. Sess.), as amended April 26, 2018, p. 5] ["[b]ecause SB 1302's amendments to the Act go beyond simply implementing AUMA, Legislative Counsel assigned the bill a two-thirds vote key"].) The Senate Rules Committee analysis went further, stating that even a two-thirds vote might be insufficient, since removal of local control was such a deviation from the "core goal of AUMA" that it might not further the purposes of the measure, as required for any amendment of Prop. 64. (*Id.*, at 4-5.)[10]

D. BCC Promulgates Regulation 5416(d), With A Rulemaking Record That Exposes BCC's Blatant Disregard For The Limitation Imposed By The California Electorate On State-Level Preemption Of Local Control.

MAUCRSA grants authority to BCC to "make and prescribe reasonable rules and regulations as may be necessary to implement, administer, and enforce [its] respective duties under this division . . . ." (§ 26013, subd. (a).) BCC, however, remains a creature

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[9] The Court may examine this analysis in evaluating legislative intent. (*Jevne v. Superior Court* (2005) 35 Cal. 4th 935, 948.)

[10] Section 1302's demise is instructive and may properly be considered by the Court, as it reflects an instance where "the Legislature has studied an issue . . . and thereafter decline[d] to change the law or adopt a new proposal." (*Cal. Chamber of Commerce v. State Air Reources. Bd.* (2017) 10 Cal.App.5th 604, 630; *see also Cooper v. Swoap* (1974) 11 Cal.3d 856, 859 [rejection of proposed legislation identical to regulation indicative that regulation contrary to legislative intent].)

of and subject to the enabling statutory framework, and its rules and regulations must be "consistent with the purposes and intent of the [Prop. 64]." (*Ibid.)* Unfortunately, BCC lost sight of these guideposts in its effort to seize statewide regulatory control over all cannabis deliveries.

In 2017, the BCC adopted emergency regulations to implement and interpret MAUCRSA. (RJN, Ex. 47 [Cal. Reg. Notice Register 2017, No. 51-Z, p. 1958 [(operative Dec. 7, 2017)}.) The regulations would have been repealed by operation of law on June 6, 2018. However, the BCC refiled the emergency regulations with amendments. (Cal. Reg. Notice Register 2018, No. 24-Z, p. 934 [operative June 6, 2018].) Regulation 5416(d) was not included in either the 2017 emergency regulations or the emergency regulations readopted on June 6, 2018.

With striking timing, soon after SB 1302 died in the Legislature, BCC first proposed through administrative action to reach the same end as the derailed legislation. On July 13, 2018, BCC issued the formal notice required by the APA to adopt the emergency regulations as "permanent" regulations (known as a "certificate of compliance"). This permanent rulemaking package included for the first time, Regulation 5416(d)'s statewide preemption of local control with respect to cannabis deliveries. (Administrative Record ("AR") 1299 [State of California Office of Administrative Law - Notice of Approval of Certificate of Compliance].)

Problematically, BCC's proposed rule mirrored the intended effect of SB 1302, as it specifies that delivery must be "made to a physical address in any California jurisdiction." (RJN, Ex. 51 [Cal. Reg. Notice Register 2018, No. 28-Z, p. 1063].) Equally problematically, in the Initial Statement of Reasons, BCC's proposed rule made no reference to Section 26200 and its sweeping protection for local authority, and, contrary to Sections 26200 and 26090, included no provision for local regulation of deliveries. (RJN, Ex. 52 [BCC Initial Statement of Reasons].) Instead, BCC's Initial Statement of Reasons incorrectly claimed that Section 26090, subdivision (e), "prohibits a local jurisdiction from preventing delivery of cannabis goods on public roads by a

licensee acting in compliance with law." (*Id.* at 110.)

This disregard for statute and local control deepened during the rulemaking process. In responses to comments questioning the proposed regulation's improper overreach with respect to local control, BCC elected – repeatedly – to misquote Section 26090, eliminating in the process that section's direct incorporation of Section 26200 and the resulting applicability of local ordinances with respect to deliveries. BCC also essentially disregarded numerous comment letters warning that Regulation 5416(d) conflicts with the statutory provisions granting local control.[11]

Review of a sample of these BCC responses to comments submitted during the rulemaking process exposes BCC's deliberate re-writing of Section 26090 to eliminate its express constraint on state-level preemption. First, an example of BCC's misstatement of the law under Section 26090:

> Comment: Commenters request that local governments have the authority to regulate commercial cannabis activity in their jurisdiction as provided by Section 26200, including prohibiting delivery in their jurisdiction.
>
> Response: The Bureau agrees in part with this comment. Local jurisdictions have the authority to regulate commercial cannabis businesses operating in their jurisdiction. **However, Business and Professions Code section 26090 provides that local jurisdictions shall not prevent delivery of cannabis goods on public roads.**

(AR 513 [Final Statement of Reasons Appendix A – Bureau Summary and Response to 45-day Comments], emphasis added.) [12]

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[11] The BCC's Cannabis Advisory Committee, which was formed to advise the BCC in developing regulations to implement Prop. 64, also raised concerns that the regulation eliminated local control granted to cities and counties in Prop. 64. RJN, Ex. 53. (*Cannabis Advisory Committee Meeting Minutes* https://bcc.ca.gov/about_us/meetings/materials/20181108_cac_2.pdf (August 20, 2018), Page 15)

[12] For reference, Section 26090, subdivision (e), actually provides as follows:

> (e) 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**.

(§ 26090, subd. (e), emphasis added). BCC proceeded as though the bolded text is not in the statute.

BCC repeated this misconstruction throughout its responses:

> Comment: Commenters request that local governments have the authority to regulate commercial cannabis activity in their jurisdiction as provided by Section 26200, including prohibiting delivery in their jurisdiction.
>
> Response: The Bureau agrees in part with this comment. Local jurisdictions have the authority to regulate commercial cannabis businesses operating in their jurisdiction. **However, the Act does not allow a local jurisdiction to prevent delivery on public roads**. As a result of the 45-day comment, the Bureau added clarifying language that delivery pursuant to this section must be in compliance with delivery requirements in the regulations to avoid confusion.

(AR 1107 [Final Statement of Reasons Appendix C – Bureau Summary and Response to 15-day Comments, at p. 1107], emphasis added.)

BCC's misstatement of Section 26090 was only matched by its deliberate omission of any mention of Section 26200:

> Comment: Commenter believes that the regulation does not clearly indicate whether a retailer can deliver to any jurisdiction.
>
> Response: The Bureau disagrees with this comment. The regulation clearly indicates that a retailer may deliver to **any** jurisdiction.

(AR, Ex. B [Final Statement of Reasons Appendix C – Bureau Summary and Response to 15-day Comments- at 1120], emphasis added.)

> Comment: Commenter states the definition should be amended [in 5000(s)] to clarify that "publicly owned land" includes public rights-of-way to ensure that those activities generally prohibited on public lands to not take place on public roads.
>
> Response: The Bureau disagrees with this comment. The Bureau prohibits delivery of cannabis goods to an address located on publicly owned land. (see section 5416). Thus, the term "publicly owned land" needed to be defined. However, including public-rights-of-way would not only not make sense for inclusion due to the way "publicly owned land" is used in the regulation, **but would also run afoul of the Act, which explicitly prohibits a local jurisdiction from preventing delivery, and transportation, of cannabis goods on public roads.** (See Bus. & Prof code section 26090(e) and 26080(b)."

(AR 539 [Final Statement of Reasons Appendix A – Bureau Summary and Response to 45-day Comments], emphasis added.)

Indeed, BCC was express in its disregard for local authority in advancing its *ultra*

vires preemptive effort:

> Comment: Commenters suggest that the regulations clearly indicate whether a retailer may deliver cannabis into a jurisdiction that has explicitly prohibited delivery.
>
> Response: The Bureau agrees with this comment. The language of section 5416 specifically addresses this issue.

(AR 539 [Final Statement of Reasons Appendix A – Bureau Summary and Response to 45-day Comments].)

The final rule, submitted to the Office of Administrative Law ("OAL") on December 3, 2018, and approved[13] by OAL on January 16, 2019, allows for cannabis delivery "to any jurisdiction within the State of California provided that such delivery is conducted in compliance with all delivery provisions of" the BCC's state-level regulations. (AR 65 [Order of Adoption - Bureau of Cannabis Control Text of Regulations, California Code of Regulations, Title 16, Division 42].) Local control is not referenced.

V. DISCUSSION

BCC seeks to impose a uniform delivery framework throughout the State. Yet, assessing whether such uniformity is desirable is not a policy judgment Prop. 64 delegates to (or even allows) BCC to make. Instead, through Prop. 64 and MAUCRSA, the voters and then the Legislature already answered this question in favor of express preservation of local control. BCC cannot disregard these policy judgments. Indeed, given the statutory limitations on amendment set forth in Prop. 64, which are subject to protection by the California Constitution, even the California Legislature lacks the authority to revisit this judgment, as it has already recognized.

Below, Plaintiffs set forth the standard of review governing this Court's

[13] OAL's approval of a regulation is irrelevant for purposes of judicial review. "The approval of a regulation ... by the [OAL] ... *shall not be considered* by a court in any action for declaratory relief brought with respect to a regulation." (Gov. Code, § 11350, subd. (c), italics added; see also *Jimenez v. Honig* (1987) 188 Cal.App.3d 1034, 1040, fn. 4 ["The courts are precluded from considering ... the opinion of the OAL ... in reviewing the validity of the regulation"].)

examination of the validity of Regulation 5416(d). Next, Plaintiffs identify the specific statutory protections preserving local control that mandate rejection of BCC's effort at preemption. Plaintiffs then review the legislative history of Prop. 64, which confirms that the electorate acted through Prop. 64 to preserve local control over cannabis activities. Finally, Plaintiffs conclude with an examination of additional factors that require this Court's rejection of BCC's *ultra vires* effort at administrative preemption of municipal authority, including the California Constitution's protection of municipal police power and the related presumption against preemption of that power.

A. Standard of Review:

1. This Court May Exercise Its Independent Judgment In Assessing The Validity Of Regulation 5416(d) Because Plaintiffs' Challenge Presents A Pure Legal Issue Of Statutory Interpretation.

Plaintiffs contend that Regulation 5416(d)'s purported preemption of existing and future local regulation of cannabis deliveries violates the law. The purported preemption violates Section 26200, which mandates that no state-level enactment may supersede or limit local government authority to regulate or bar the operation of cannabis businesses within the locality. The purported preemption violates Section 26090, which specifies that local governments can permit, restrict, or bar deliveries to local addresses within their borders as they see fit, consistent with the full reservation of authority to them under Section 26200. And the purported preemption violates the expressly stated "purpose and intent" of AUMA and MAUCRSA, which include full and enduring protection of local authority. Because of these multiple violations of the law, BCC's promulgation of Regulation 5416(d) was *ultra vires*, and the regulation void and unenforceable.

The nature of Plaintiffs' challenge simplifies this Court's standard of review. The California Supreme Court has held that while an agency regulation carries with it a presumption of validity, that presumption is not controlling when the challenge implicates statutory interpretation. (*See Association of California Ins. Companies v. Jones* (2017) 2 Cal.5th 376, 389-90 ("*ACIC*").) Such is the case with Plaintiffs' challenge here, which raises solely legal issues concerning BCC's compliance with the statutory framework.

Applying well-known and established canons of statutory construction, the Court will thus be tasked with construing the governing statutes to determine whether BCC's regulation falls within the defined scope of its regulatory authority. This determination is "a question of law" on which the court will exercise "independent judgment."[14] (*ACIC, supra,* 2 Cal.5th. at 390, citing *Western. States Petroleum Assn. v. Bd. Of Equalization* (2013) 57 Cal.4th 401, 415 [holding that where a court has been asked to decide whether the agency's regulation is inconsistent with the statute or does not "lay within the lawmaking authority delegated by the Legislature," the issue of "statutory construction is a question of law on which a court exercises independent judgment"]; *see also Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, 17 [noting that while typically deference is given to the administrative agency; "[w]hen, however, a regulation is challenged as inconsistent with the terms or intent of the authorizing statute, the standard of review is different, because the courts are the ultimate arbiters of the construction of a statute"]; *Citizens to Save California v. California Fair Political Practices Com.* (2006) 145 Cal.App.4th 736, 747 ("Citizens to Save California") [courts do not "defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature"]; *Henning v. Division of Occupational Saf. & Health* (1990) 219 Cal.App.3d 747, 758 ["[T]here is no agency discretion to promulgate a regulation which is inconsistent with the governing statute."].)

Fundamentally, then, the issue for decision may be framed simply. Regulations that alter or amend the enabling statute, or impair its scope, are invalid. (*ACIC*, *supra,* 2

[14] The Supreme Court observed that while "great weight and respect" may be accorded an agency's construction in circumstances where the interpretation implicates an agency's technical knowledge or expertise and where the care employed by the agency in promulgating the regulation tends to support its correctness, the Court still has the "ultimate responsibility to decide" whether the regulation falls within the agency's statutory authority. (*ACIC*, *supra,* 2 Cal.5th at 390.) Here, no technical issues are implicated on the question of whether the voters intended to maintain local control, as the plain language of the statute demonstrates they did. Similarly, as reviewed above, BCC exhibited no special care in promulgating this regulation; indeed, its Responses to Comments during rulemaking expose a blatant disregard for the controlling law. (See Section IV.D, *supra*.)

Cal.5th at 390.)[15] The Court will compare BCC's regulation with the scope of its regulatory authority as defined by statute. Here, the Court will find that BCC's regulation well exceeds its authority, and BCC's application of the controlling law so clearly erroneous that it will be subject to no deference whatsoever. (*See Bonnell v. Medical Board* (2003) 31 Cal.4th 1255, 1265 (*"Bonnell")*.)

2. **Established Canons Of Statutory Construction Will Guide This Court In Evaluating Regulation 5416(d)'s Validity.**

In evaluating Regulation 5416(d), the Court will seek to ascertain the intent of the lawmakers (here, including the voters) so as to effectuate the purpose of the statute. (*Spanish Speaking Citizens' Foundation, Inc. v. Low* (2000) 85 Cal.App.4th 1179, 1213-14.) In this, it does not matter whether the Court is looking at an initiative or a legislative statute, as identical principles of statutory construction apply. (*Citizens to Save California, supra,* 145 Cal.App.4th at 747.)

The Court will first examine the relevant language, "giving the words their usual and ordinary meaning, viewed in the context of the statute as a whole and the overall statutory scheme." (*Citizens to Save California, supra,* 145 Cal.App.4th at 747; *see also Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737 [holding that statutory provisions are not examined in "isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment"].) "Interpretative constructions which render some words surplusage, defy common sense, or lead to mischief or absurdity, are to be avoided." (*Henning v. Division of Occupational Saf. & Health, supra,* 219 Cal.App.3d at 760.) Instead, "[c]ourts should give meaning to every word of a statute if possible, and

[15] Similarly, "[a] valid regulation must 'fit within the scope of authority conferred" by the Legislature. (*ACIC, supra,* 2 Cal.5th at 390, citing the APA, Gov. Code, § 11342.1.) "[N]o regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (Gov. Code, § 11342.2.) "Consistent" under the Government Code refers to the regulation being "not in conflict with or contradictory to," existing provisions of law. (Gov. Code, § 11349(d).)

should avoid a construction making any word surplusage.'" (*Reno v. Baird* (1998) 18 Cal.4th 640, 658.) Courts may also refer to "other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." (*Citizens to Save California, supra,* 145 Cal.App.4th at 747.)

In the final analysis, the plain meaning governs, as the courts recognize that the Legislature, and by extension the voters, "meant what it said." (*Smith v. Workers' Comp. Appeals Bd.* (2009) 46 Cal.4th 272, 277; *see also People v. Cole* (2007) 38 Cal.4th 964, 975 ["If the statutory language is unambiguous, then its plain meaning controls."].) In this case, Sections 26200 and 26090 leave nothing to question and nothing in doubt. Moreover, even were there any lingering issue as to the correctness of Plaintiffs' position, the legislative history removes it.

B. BCC's Effort To Preempt Local Control Violates Prop. 64's Guarantee Of Direct Local Control Over Cannabis Deliveries.

1. BCC's Regulatory Authority Derives From, And Is Constrained By, Prop. 64/MAUCRSA

Then Governor Jerry Brown signed MAUCSRA (Sen. Bill 94 (2017-2018 Reg. Sess.) in June 2017 to "provide for a single regulatory structure for both medicinal and adult-use cannabis" and to "ensur[e] a regulatory structure that prevents access to minors, protects public safety, public health and the environment, ***as well as maintaining local control***."[16] (Sen. Bill 94, (2017-2018 Reg. Sess.) § 1, emphasis added.) Senate Bill 94 renamed the "Bureau of Medical Cannabis Regulation" as the "Bureau of Cannabis Control" ("BCC") and designated BCC as the single state administrative agency charged with regulating the cannabis industry at the state level. (Sen. Bill 94, (2017-2018 Reg. Sess.) § 102; *see also* § 26010.5, subds. (d) and (e).)

Senate Bill 94 specified, however, that it did "not limit the authority or remedies of a city, county, or city and county under any provision of law." (Sen. Bill 94, (2017-2018 Reg. Sess.) § 102; *see also* § 26200, subd. (f).) Further, per these enabling statutes,

[16] *See* Section IV.A, *supra*, for discussion of Senate Bill 94.

BCC expressly has only the "power, duty, purpose, responsibility, and jurisdiction to regulate commercial cannabis activity as provided in this division." (§ 26010.5(d); *see also* § 26000, subd. (c) [" . . . this division sets forth the power and duties of the state agencies responsible for controlling and regulating the commercial medicinal and adult-use cannabis industry"]; § 26013, subd. (c) [BCC's regulations must be "necessary to achieve the purposes of the division. . . ."]; § 26013(a) ["Licensing authorities shall make and prescribe reasonable rules and regulations as may be necessary to implement, administer, and enforce their respective duties under this division . . . ."].)[17]

As these provisions establish, BCC is no different than any other administrative agency and has only as much rulemaking power as the statutes vest in it. (*See Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 299.) To repeat, "[a]dministrative regulations that alter or amend the statute . . . are void." (*Yamaha Corp. of America v. State Bd. Of Equalization*, *supra*, 19 Cal.4th at 16.) When BCC promulgates regulations, therefore, it must do so in a way that *meets* the requirements and purposes of the statutory framework, not defeats them. With Regulation 5416(d), BCC lost sight of these fundamental constraints.

2. **Prop. 64 Expressly Protects Local Control Of Cannabis Businesses.**

The voters in approving Prop. 64 implemented a two-tiered regulatory framework, state and local, with the two regulatory authorities operating in parallel, each with full authority to regulate or halt cannabis business activity, albeit with different geographic reach. (AR 234-35, 245-46.) Under this framework, state-level requirements establish the baseline minimum and constitute the necessary but not sufficient condition for establishing or operating a cannabis business in the state. (AR 330, 245-46, 294.)

[17] Section 26013 also expressly incorporates the rulemaking requirements of the APA (Gov. Code, §§ 11340-11361), which provides that to be effective, regulations "shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law." (Gov. Code, § 11342.1; *see also* Gov. Code, § 11342.2 ["[N]o regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute."].)

Compliance with *each* local ordinance then stands as an *additional* requirement for doing business in any specific local jurisdiction, with each locality being free to impose greater or more regulations than the state-level minimums and being free to bar cannabis businesses altogether. (AR 329, 337, 339, 381, 477, 719.)

Unambiguous statutory language implements this two-tiered structure and protects local authority against state-level preemption. Section 26200 sets forth a sweeping preservation of local authority against any purported preemptive effort:

> **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**.

(§ 26200, subd. (a)(1), emphasis added.)

The reach of this regulatory power, including the power to ban, extends to the "establishment or operation" of cannabis businesses. (§ 26200, subd. (a)(1).) The "operation" of a cannabis business includes delivery. (§ 26001, subd. (k) ["'Commercial cannabis activity' includes the cultivation, possession, manufacture, distribution, processing, storing, laboratory testing, packaging, labeling, transportation, **delivery**, or sale of cannabis and cannabis products as provided for in this division." (Emphasis added)].)

There could be no clearer statement of the preservation of local authority against state-level preemption, including as to cannabis deliveries. (§§ 26200; 26001, subd. (k).) If Section 26200 were the sole statutory provision supporting Plaintiffs' position on the preservation of local authority, it would suffice. (*See City of Vallejo v. NCORP4, Inc.* (2017) 15 Cal.App.5th 1078, 1081-82 [reviewing Prop. 64 in the context of dispensaries, holding, " . . . Prop. 64 expressly provides that state regulations do not 'limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate' marijuana dispensaries 'or to completely prohibit' their 'establishment or operation.'"].)

In fact, however, it is not the only section. Multiple additional provisions support Plaintiffs' position. The very next provision within Section 26200 provides as follows:

> This division shall not be interpreted to supersede or limit existing local authority for law enforcement activity, enforcement of local zoning requirements or local ordinances, or enforcement of local license, permit, or other authorization requirements.

(§ 26200, subd. (a)(2).)

This direct protection of local authority is then re-iterated in Section 26200, subdivision (f), which expressly identifies and preserves localities' historically and constitutionally protected police powers:

> This division, **or any regulations promulgated thereunder**, shall not be deemed to limit the authority or remedies of a city, county, or city and county under any provision of law, including, but not limited to, Section 7 of Article XI of the California Constitution.

(§ 26200, subd. (f), emphasis added.)[18]

Similarly confirming the preeminence and protection of local power under the two-tiered regulatory structure, the *state-level* administrative agency, BCC, must account for violations of *local* law in making *state-level* licensing decisions:

> A local jurisdiction shall notify the bureau upon revocation of any local license, permit, or authorization for a licensee to engage in commercial cannabis activity within the local jurisdiction. Within 10 days of notification, the bureau shall inform the relevant licensing authorities. Within 60 days of being so informed by the bureau, the relevant licensing authorities shall begin the process to determine whether a license issued to the licensee should be suspended or revoked pursuant to Chapter 3 (commencing with Section 26030).

(§ 26200, subd. (c); *see also* § 26030, subd. (f) [grounds for discipline of a state licensee include, "Failure to comply with the **requirement of a local ordinance regulating commercial cannabis activity**" (emphasis added)]; § 26037, subd. (a) [actions of a licensee will not be unlawful under state law where they are, "(1) permitted under a license issued under this division **and any applicable local ordinances** . . . ." (Emphasis

[18] Section 7 of Article XI of the California Constitution provides that, "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

added.)]; § 26037, subd. (b) [property owners will not act unlawfully by allowing licensees to use their property where the use is "permitted pursuant to a state license **and any applicable local ordinances** . . . ." emphasis added; § 26054, subd. (b) [licensees shall not be located within a 600-foot radius of a school, "unless a licensing authority or a local jurisdiction specifies a different radius."]; § 26055, subd. (d) ["Licensing authorities shall not approve an application for a state license under this division **if approval of the state license will violate the provisions of any local ordinance or regulation adopted in accordance with Section 26200**," (Emphasis added.]; § 26051, subd. (c)(2) [allowing for local ordinances to specify concentration limits for retail cannabis businesses within a jurisdiction].[19]

The statutes enacted under Prop. 64 also expressly denote state-level regulation as the "minimum standards," with local authority operating in parallel to impose more stringent requirements as the locality might choose:

> Any standards, requirements, and regulations regarding health and safety, environmental protection, testing, security, food safety, and worker protections established by the state shall be the minimum standards for all licensees under this division statewide. **A local jurisdiction may establish additional standards, requirements, and regulations**.

(§ 26201, emphasis added.)

The statutory framework not only places no limits on local regulatory power within the locality's boundaries, it preserves it to the fullest, expressly and through incorporation of the California Constitution's enshrinement of local authority. (§§ 26200, subds. (a)(1), (a)(2), (f).) Localities may regulate commercial cannabis activity or bar it altogether. (§ 26200, subd. (a)(1).) The plain language of the controlling statutes allows for no other conclusion and establishes BCC's effort at preemption through Regulation 5416(d) as contrary to law.

[19] The applicable provisions expressly provide mechanisms for the BCC to remain apprised of these governing local requirements. (*See, e.g.*, § 26055, subds. (e), (f), (g).)

3. Prop. 64 Also Includes Specific Provisions Ensuring Local Regulatory Authority Over Cannabis Deliveries.

Provisions following Section 26200 confirm the power of local government to regulate or bar deliveries within its jurisdiction, subject only to the "constraint" that one locality cannot use its regulatory authority to impact another locality's regulatory choices through interference with travel on public roads.

Sections 26080 and 26090 address these cannabis shipment issues. Section 26080 is entitled, "Transport or distribution outside the state; local jurisdictions." Section 26080, subdivision (a), confirms that nothing in California law should be read to permit the interstate transportation or distribution of cannabis. Next, Section 26080, subdivision (b), provides that, "A local jurisdiction shall not prevent transportation of cannabis or cannabis products on public roads by a licensee transporting cannabis or cannabis products in compliance with this division."

This provision does not encompass retail delivery, which is the subject of a different provision, Section 26090, discussed next. Rather, Section 26080 reaches the transportation of cannabis and cannabis products between licensed entities, such as between a cultivator and a distributor, or a distributor and a retailer. (*See* § 26001, subd. (r) ["'Distribution' means the procurement, sale, and transport of cannabis and cannabis products between licensees."]; *see also* Cal Code Regs., tit. 16, § 5000, subd. (x) ["'Transport' means the physical movement of cannabis goods from one licensed premises to another licensed premises."].)

Section 26080's effect on localities is minor: They cannot stop distribution of cannabis *through* their jurisdiction on public roads, but they have plenary authority to stop distribution *to* addresses within the jurisdiction. This unfettered authority with respect to local addresses arises from Section 26200, reviewed above. Localities maintain under Section 26200 the right to regulate or "completely prohibit" the establishment or operation of cannabis businesses within the local jurisdiction. By barring the physical establishment of a cannabis business licensee within the locality's borders, a locality will necessarily ensure that there will be no transportation to such a licensee in the local jurisdiction. One

cannot transport to a destination that is not there. Section 26080 simply mandates that one local jurisdiction not interfere with transportation on public roads of cannabis destined for licensees in *other* jurisdictions.

Section 26090 operates similarly, but with respect to "delivery":[20]

> (a) Deliveries, as defined in this division, may only be made by a licensed retailer or microbusiness, or a licensed nonprofit under Section 26070.5.
>
> . . . .
>
> (e) 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**.

(§ 26090, emphasis added.)

As described in Section IV.D, *supra*, BCC arbitrarily and capriciously disregarded this bolded text in purporting to justify Regulation 5416(d) against objections raised during the rulemaking period. (AR 7921-63, 7972, 7975-93, 8859-60, 9192-9215, 9217-27, 10080, 10105, 10108-10140, 10142-10194, 10196-10197, 10199, 10201-10202, 10204-10212, 10216, 10219-10737, 10740-10851.) But through the bolded text and Section 26090's incorporation of the broad powers reserved to localities under Section 26200, Section 26090 ensures local control remains intact and unfettered: No delivery to a local address can lawfully proceed *unless* permitted by local law.

The additional language referencing Section 26200 was not required in Section 26080, given that, as noted, a locality can effectively bar all distribution to local licensee by prohibiting all locally sited licensees. Deliveries pose a different issue. A local jurisdiction cannot reach beyond its borders to bar cannabis business establishment or operation, and there is no inherent limitation on the location of a potential "customer" for any particular retailer engaged in delivery. Thus, the added language in Section 26090 makes clear that a locality can bar all deliveries to local addresses, including those by

[20] Section 26001, subdivision (p), defines delivery to mean the transfer of product to a "customer," who is a natural person 21 years of age or older per Section 26001, subdivision, (n).

out-of-jurisdiction businesses.

In this way, Section 26080 and 26090 operate congruently. (*See generally, Pacific Palisades Bowl Mobile Estates, LLC v City of Los Angeles* (2012) 55 Cal.4th 783, 805 ["A court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them," and "give force and effect to all of their provisions"].) A local jurisdiction can regulate or entirely prohibit all transportation and all deliveries to addresses *within* its jurisdictional borders, but cannot prevent the use of local roads for transportation or deliveries through its jurisdiction to *other* jurisdictions where such deliveries are otherwise permissible under state and the law of the destination locality. Together, Sections 26200 and 26090 preserve local authority to regulate or prohibit deliveries and prohibit state-level preemption of this authority. (*See also* Section V.B.4, *infra* [discussing voter ballot materials promising voters localities would only be restricted from stopping cannabis transportation *through* the jurisdiction].)

Regulation 5416(d) cannot stand in the face of the plain language of these provisions. These statutes unmistakably demonstrate that the electorate has already made the pertinent policy decision on local control, and they necessarily eliminate the relevance of any potential BCC contention that it applied administrative expertise in the promulgation of Regulation 5416(d). BCC's regulation violates the plain language of the controlling statutes and is therefore void. (*See Bonnell, supra,* 31 Cal.4th at 1265 ["The Board's interpretation is incorrect in light of the unambiguous language of the statute. We do not accord deference to an interpretation that is "clearly erroneous." (Internal citation, quotation omitted)]; *Capen v Shewry* (2007) 155 Cal.App.4th 378, 395 [addressing issue regarding the "jurisdictional extent of the Department [of Health Services] licensing power over surgical clinics," and voiding its interpretative regulation, which purported to require Department licensing of physician-owned and operated clinics, on the grounds that the agency lacked jurisdiction to require such licensing under

the controlling statutes].)[21]

Indeed, the BCC's power grab here echoes back to a similar effort over forty years ago, where the California Supreme Court forcefully rejected an agency's effort to take unto itself legislative power notwithstanding the contrary actions of the Legislature. In *Cooper v. Swoap* (1974) 11 Cal.3d 856, the California Supreme Court voided a welfare regulation as inconsistent with governing statutory provision. In so holding, it observed that "a provision identical to the instant regulation was proposed by the administration but was decisively rejected by the Legislature; thus the legislative history provides perhaps the clearest indication that the present regulation is inconsistent with legislative intent." (*Id.* at 859, 863-65, 872.) The Supreme Court then took the agency to task for seeking to elevate its administrative rulemaking power over that of the Legislature: "In promulgating the regulation in question here, the department has ignored this fundamental principle of administrative law, and has arrogated to itself the authority to reject explicit legislative determinations, an authority which is completely incompatible with the basic premise on which our democratic system of government rests." (*Id.* at 864-65.) So too here, where BCC would elevate its power over that of the voters and the Legislature.

The governing statutory framework bars BCC's preemptive effort. Prop. 64 requires accommodation of local authority, not its nullification. Moreover, as discussed in the next section, the voters were *expressly* told Prop. 64 would protect local control, such that BCC's regulatory action directly violates not only the plain language of the statute, but also the plainly expressed underlying voter intent.

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[21] *See also Diageo-Guinness USA, Inc. v. State Board of Equalization* (2012) 205 Cal.App.4th 907, 920-21 (applying rule that, "[a]dministrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations"; holding that "the Legislature did not delegate authority to the Board to adopt its own classification of alcoholic beverages for purposes of excise taxation"; and declaring regulation re-defining "distilled spirits" to include flavored malt beverages for excise tax purposes to be void); *Advanced Real Estate Servs., Inc. v. Superior Court* (2011) 196 Cal.App.4th 338, 350 ("administrative discretion" cannot be used to excuse noncompliance with plain statutory language).

4. **The Legislative History Of Prop. 64 Speaks Forcefully To The Preservation And Protection Of Local Authority Over Cannabis-Related Business.**

As discussed above, there is no ambiguity in the language of Sections 26200 and 26090, or in the surrounding statutory framework, with respect to the plenary authority of local governments to regulate or bar cannabis deliveries to addresses within their borders. (*See People v. Valencia* (2017) 3 Cal.5th 347, 357 ["We have long recognized that the language used in a statute or constitutional provision should be given its ordinary meaning, and [i]if the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters)." (Internal quotations, citations omitted.).] Even so, if there is any question at all, the ballot materials presented to the voters here conclusively end all doubt. (*See Id.* at 364 [the materials before the voters can be used to resolve ambiguity].)

Through the Prop. 64 ballot materials, California voters were presented with a proposition that expressly, clearly, and repeatedly preserved the authority of local jurisdictions to regulate commercial cannabis activities within their boundaries. Section 2 of the text of Prop. 64, "Findings and Declarations," highlighted the importance of local control:

> Section 2. Findings and Declarations.
>
> . . .
>
> E. There are currently no laws governing adult use marijuana businesses to ensure that they operate in accordance with existing California laws. Adult use of marijuana may only be accessed from the unregulated illicit market. The Adult Use of Marijuana Act sets up a comprehensive system governing marijuana businesses at the state level **and safeguards local control, allowing local governments to regulate marijuana-related activities, to subject marijuana businesses to zoning and permitting requirements, and to ban marijuana businesses by a vote of the people within a locality**.

(RJN, Ex. 45, at 5, [Prop. 64, § 2, subd. (E)], emphasis added.)

This safeguarding of local control was repeated in the next section, which stated the "Purpose and Intent" of the initiative:

> " . . . It is the intent of the people in enacting this act to accomplish the following:
> . . . .
> (c) Allow local governments to enforce state laws and regulations for nonmedical marijuana businesses **and enact additional local requirements for nonmedical marijuana businesses**, but not require that they do so for a nonmedical marijuana business to be issued a state license and be legal under state law.
> (d) **Allow local governments to ban nonmedical marijuana businesses as set forth in this act**.

(RJN, Ex. 45, at 6 [Prop. 64, § 3, subds. (c), (d)], emphasis added.) (AR 7496, AR 1619).

These overarching objectives were to be implemented through unambiguous statutory provisions in the Business and Professions Code. These provisions included Chapter 20 entitled "Local Control," that subsequently became Section 26200 of the Business and Professions Code:

> 26200. (a)(1) This division shall be interpreted not 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.

(§ 26200, subd. (a)(1).)

The voters had this specific provision available to them in approving Prop. 64.[22] As "commercial marijuana activity" was defined broadly in Prop. 64 to include the "cultivation, possession, manufacture, distribution, processing, storing, laboratory testing, labeling, transportation, distribution, **delivery** or sale of marijuana and marijuana products" (§ 26001, subd. (d), emphasis added), the regulatory reach of local jurisdictions – to and including the power of prohibition – was from the start intended to reach every aspect of the business, including, as pertinent here, delivery.

Additional provisions before the voters emphasized the two-tiered nature of the

[22] " . . .[V]oters who approve an initiative are presumed to have voted intelligently upon an amendment to their organic law, the whole text of which was supplied [to] each of them prior to the election and which they must be assumed to have duly considered . . . ." (*People v. Valencia, supra*, 3 Cal. 5th at 369, internal quotations omitted).

regulatory oversight, repeatedly confirming that *both* state and local requirements had to be met. (See, e.g., § 26030, subd. (f); § 26037, subd. (a); § 26037, subd. (b); § 26054, subd. (b); § 26055, subd. (e); § 26071; Sections V.B.2, supra; AR 329, 337, 339, 381, 477, 719.) Similarly, the voters had before them Section 26090, discussed in Section V.B.3, which confirmed local authority over deliveries through direct incorporation of Section 26200. (§ 26090.)

The analyses and arguments in the official ballot pamphlet are also indicative of intent, and similarly spoke of local control. (*See People v. Birkett* (1999) 21 Cal.4th 226, 243.) The official argument in favor told voters that the initiative "preserves local control." (RJN, Ex. 46, at 99 [Official Voter Information Guide].) The Legislative Analyst's analysis, which was printed in the ballot pamphlet for the General Election of November 8, 2016, also confirmed and emphasized this local authority, stating as follows:

> Under the measure, cities and counties ***could regulate*** nonmedical marijuana businesses. For example, cities and counties could require nonmedical marijuana businesses to obtain local licenses and restrict where they could be located. ***Cities and counties could also completely ban marijuana-related businesses***. However, they could not ban the transportation of marijuana ***through*** their jurisdictions."

(RJN, Exhibit 46, at 93, emphasis added.)[23] No exception or provision barred a locality from regulating or prohibiting deliveries within the local jurisdiction.

Voters also were presented with the long-form ballot summary, which stated that Prop. 64, "[a]llows local regulation and taxation of marijuana." (RJN, Exhibit 46, at 90.) The shorter-ballot summary similarly stated that Prop. 64 "allows local regulation and taxation." (RJN, Exhibit 46, at 14.) The voters also considered the fiscal impact statement included on the ballot, provided by the Legislative Analyst, which determined that:

> The size of the measure's fiscal effects could vary significantly depending

[23] Under Election Code section 9087, subdivision (b), the Legislative Analyst "must provide an analysis that is "easily understood by the average voter" and it "may contain background information, including the effect of the measure on existing law and the effect of enacted legislation which will become effective if the measure is adopted, and shall generally set forth in an impartial manner the information the average voter needs to adequately understand the measure." *(People v. Valencia, supra,* 3 Cal.5th at 364.)

> on: (1) how state and ***local governments choose to regulate and tax marijuana***, . . . , Net additional state and local tax revenues that could eventually range from the high hundreds of millions of dollars to over $1 billion annually.

(RJN, Exhibit 46, at 90.)

The initiative's provisions are clear and its history unequivocal. The voters ensured that local power to regulate and prohibit remained inviolate.[24]

5. **Prop. 64's Express Protection for Local Control Over Cannabis Deliveries Reflects Long-Standing Local Authority In This Area.**

Prop. 64 did not chart new territory in protecting local control. The California Constitution expressly reserves police powers to local governments. (Cal. Const., Art. XI, §7 ["A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."].) Accordingly, when the voters acted to preserve local control under Prop. 64, they were protecting the status quo in this rapidly evolving area of the law.

This fact, particularly when coupled with express language enshrining local control, cautions for deep skepticism of BCC's administrative effort to undermine the purpose and provisions of this initiative. Voters are presumed to be aware of existing law at the time an initiative is enacted. (*People v. Valencia*, *supra,* 3 Cal. 5th at 369; *Professional Engineers in California Government v. Kempton* (2007) 40 Cal. 4th 1016, 1048 ("*Professional Engineers"*).) By November 2016, at the passage of Prop. 64, local governments had well established and broad regulatory power over cannabis distribution and delivery. As one court noted, any doubt concerning local government's authority to regulate marijuana dispensaries was completely eliminated by 2011. (*County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 868 (*"Hill").*)[25] And the California

[24] Prop. 64 defines a "local jurisdiction" as "a city, county, or city and county." (§ 26001, subd. (ac).)

[25] Citing *Hill*, the Santa Cruz Superior Court, in its Order denying East of Eden's preliminary injunction motion (discussed above in Section II.B, *supra*), wrote that "the California appellate courts have confirmed that cannabis operations are absolutely subject to municipal regulation." (RJN 38, [Order at 2:27 – 3:2].)

Supreme Court ruled conclusively in favor of local control, including outright bans, in the context of medical marijuana in *City of Riverside v Inland Empire Patients Health & Wellness Center Inc.* (2013) 56 Cal.4th 729, 753 ("*Riverside*").

California Courts of Appeal similarly confirmed local authority to restrict the ability to "distribute, or otherwise obtain" medical cannabis. (*Conejo Wellness Center, Inc. v City of Agoura Hills* (2013) 214 Cal. App. 4th 1534, 1555.) This local power sourced not only from land use and zoning authority, but also to the locality's constitutional authority to regulate the manner by which a business operates. (*See Hill, supra*, 192 Cal. App. 4th at 896; *see also* Cal. Const., art. XI, § 7.) As such, the Court of Appeal upheld a County of Los Angeles ordinance that comprehensively regulated the distribution of medical cannabis, and all but banned vehicle delivery except in very limited circumstances. (*People ex rel. Feuer v. Nestdrop, LLC* (2016) 245 Cal. App. 4th 664, 675 [affirming preliminary injunction enforcing local ordinance against app-based delivery scheduling service].)

Local control was thus the rule, not the exception, at the time Prop. 64 went before the voters, and Prop. 64 made express that such local control would remain. "Absent a clear indication of preemptive intent from the Legislature, [courts] presume that local regulation in an area over which [a] local government traditionally exercised control is not preempted by state law." (*Action Apartment Ass'n v. City of Santa Monica* (2007) 41 Cal. 4th 1232, 1242.) No less than the California Supreme Court stated this forcefully in the medical marijuana context, in a decision vindicating local authority. (*Riverside* 56 Cal. 4th at 767 [in confirming local authority to ban medical marijuana dispensaries pre-Prop. 64, " we cannot lightly assume the voters or the Legislature intended to impose a 'one size fits all' policy, whereby each and every one of California's diverse counties and cities must allow the use of local land for such purposes"].)[26]

[26] The California Supreme Court in *Riverside* emphasized a particular reluctance to infer preemption where local interests might vary across counties in the State. It found just such variance for medical marijuana, which weighed heavily against preemption:

BCC's stark effort to preempt local control over cannabis deliveries thus stands not only contrary to the controlling statutory framework, but also the California Constitution and the long history in this State of local authority over police and land use matters of this sort.[27]

C. Through Regulation 5416(d), BCC Seeks To Make An Impermissible End Run Around Prop. 64's Express Limitations On Amendment.

Prop. 64 imposes strict controls on future modifications of its provisions. Even the California Legislature could not accomplish what BCC seeks to do through Regulation 5416(d), making plain the administrative overreach.

These limitations on initiative amendment source to the California Constitution. It mandates that the intent of California voters as expressed through the initiative process be respected:

> "The legislative power of this State is vested in the California Legislature which consists of the Senate and the Assembly, **but the people reserve to**

> In addition, "[w]e have been particularly 'reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another. The common thread of the cases is that if there is a significant local interest to be served which may differ from one locality to another then the presumption favors the validity of the local ordinance against an attack of state preemption.

Riverside, supra, 56 Cal. 4th at 749, 767 (cataloguing differing local interests, such as varying residential vs. commercial densities, and differing concerns for crime, congestion, blight and drug abuse, particularly in view of federal criminal law). Allowing for this variance is precisely what the voters mandated through Prop. 64, where cannabis remains unlawful under federal law, and California localities have taken diverse approaches to cannabis regulation to reflect local concerns and needs. (*See* RJN, Exs. 1 to 37.)

[27] There is another related factor. Cannabis remains a controlled substance under federal law. (21 U.S.C. § 801, et seq.) While Prop. 64 exempts commercial cannabis business operations from certain state criminal provisions, the federal provisions remain. Nothing in the governing statutes or the California Constitution accords BCC the authority to mandate that local governments authorize, allow, or accommodate these federally barred activities. *See Riverside, supra,* 56 Cal.4th at 759 ("Similarly here, the [Medical Marijuana Program Act] merely exempts the cooperative or collective cultivation and distribution of medical marijuana . . . from prohibitions that would otherwise apply under state law. The state statute does not thereby mandate that local governments authorize, allow, or accommodate the existence of such facilities.").

> **themselves the powers of initiative and referendum**." (Cal. Const., art. IV, § 1.) "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." (Cal. Const., art. II, § 8, subd. (a).) The electorate's legislative power is "generally coextensive with the power of the Legislature to enact statutes." (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 253.) Such statutes, moreover, like legislative enactments, are presumed to be valid. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 501.)

(*Professional Engineers, supra* 40 Cal.4th 1016, 1042 emphasis added; internal parallel citations omitted.)

Consistent with the "coextensive" power granted to the electorate, the initiative power includes the right on the part of the electorate to constrain how the Legislature might in the future modify an initiative statute:

> As part of their initiative power, the voters have the power to decide whether or not the Legislature can amend or repeal initiative statutes. **That power is absolute and includes the power to enable legislative amendment subject to conditions attached by the voters**.

(*Professional Engineers, supra*, 40 Cal.4th at 1046 fn.10, emphasis added, internal citations, quotations omitted.)

Again, this a constitutionally derived right, as the California Constitution provides that the "Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval." (Cal. Const. Art. II, § 10, subd. (c).)

The Supreme Court has thus instructed that courts must take care when evaluating potentially impermissible amendments, to ensure the will of the voters is protected:

> We begin with the observation that the purpose of California's constitutional limitation on the Legislature's power to amend initiative statutes is to protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent. **In this vein, decisions frequently have asserted that courts have a duty to jealously guard the people's initiative power, and hence to apply a liberal construction to this power wherever it is challenged in order that the right to resort to the initiative process be not improperly annulled by a legislative body**.

(*People v. Kelly* (2010) 47 Cal. 4th 1008, 1025 ("*Kelly*"), emphasis added, internal

quotations, citations omitted). Any doubts should be resolved in favor of the initiative and referendum power, and amendments which may conflict with the subject matter of initiative measures must be accomplished by popular vote, as opposed to legislatively enacted ordinances, where the original initiative does not provide otherwise. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 792.)

This backdrop of constitutionally derived protection for the will of the voters underscores the impropriety of BCC's present regulatory effort. Prop. 64 forcefully constrains any effort to alter its provisions:

> SEC. 10. Amendment.
> . . . The Legislature may **by majority vote** amend the provisions of this act contained in Sections 5 to 5.5, inclusive, and Sections 6 to 6.3, inclusive, **to implement the substantive provisions** of those sections, **provided that such amendments are consistent with and further the purposes and intent of this act as stated in Section 3**. . . . The Legislature may by majority vote amend, add, or repeal any provisions to further reduce the penalties for any of the offenses addressed by this act. **Except as otherwise provided, the provisions of the act may be amended by a two-thirds vote of the Legislature to further the purposes and intent of the act**.

(RJN, Ex. 45, at 64, emphasis added [Prop. 64, § 10].)

Thus, and as discussed earlier, the Legislature through majority vote may enact laws where appropriate to "implement" certain provisions of AUMA, and there *only* if consistent with its purpose and intent.[28] Whenever the Legislature moves beyond mere implementation of these specified sections, a two-thirds vote is required, and there again the amendment must still further the purpose and intent of the act as expressly specified in Section 3 of the original Prop. 64.

The referenced Section 3, in pertinent part, provides as follows with respect to the "purpose and intent" against which any amendment must be judged:

Section 3. Purpose and Intent.

[28] Sections 5.1 to 5.5 encompass provisions relating to the use of marijuana for medical purposes, and include Health and Safety Code sections 11362.712, 11362.713, 11362.755, 11362.84, and 11362.85. Sections 6.1 to Sections 6.3 encompass marijuana regulation and safety, and include Business and Professions Code sections 26000-26210 (Section 6.1), Labor Code section 147.6 (Section 6.2), and Water Code section 13276.

> "The purpose of the Adult Use of Marijuana Act is to establish a comprehensive system to legalize, control and regulate the cultivation, processing, manufacture, distribution, testing, and sale of nonmedical marijuana, including marijuana products, for use by adults 21 years and older, and to tax the commercial growth and retail sale of marijuana. It is the intent of the people in enacting this act to accomplish the following:
>
> (a) Take nonmedical marijuana production and sales out of the hands of the illegal market and bring them under a regulatory structure that prevents access by minors and protects public safety, public health, and the environment.
>
> (b) Strictly control the cultivation, processing, manufacture, distribution, testing and sale of nonmedical marijuana through a system of state licensing, regulation, and enforcement.
>
> (c) **Allow local governments to** enforce state laws and regulations for nonmedical marijuana businesses and **enact additional local requirements for nonmedical marijuana businesses**, but not require that they do so for a nonmedical marijuana business to be issued a state license and be legal under state law.
>
> (d) **Allow local governments to ban nonmedical marijuana businesses as set forth in this act**.
>
> . . . .

(RJN, Ex. 45 at 3 [Prop. 64, § 3], emphasis added.)

Regulation 5416(d)'s effort to preempt local control over deliveries cannot under any measure be considered the "implementation" of any provision of Prop. 64. Similarly, Regulation 5416(d) plainly runs contrary to the purposes and intent of the act. Section 3 quoted above, for example, speaks directly to the preservation of local control. Prop. 64's purposes also necessarily include those *expressly* set forth in Section 26200, such as (1) the preservation of local authority to, among other things, "completely prohibit" the operation of cannabis business within the local jurisdiction; and (2) the prohibition of any effort under Prop. 64 to "supersede or limit" local authority. (§ 26200, subd. (a)(1); *see also* § 26200, subd. (a)(2).) Prop. 64's purposes also include, of course, Section 26090's express specification of local control over deliveries, and Section 26090's incorporation of Section 26200, which not only reserves of local authority over deliveries but also protects any expression of local authority from all state-level efforts to "supersede or limit" it. (§ 26090, subd. (b).)

Furthermore, similarly specified as within the statutory purposes is the complete preservation of localities' historic police and zoning powers. (§ 26200, subd. (f) ["This division, or any regulations promulgated thereunder, shall not be deemed to limit the authority or remedies of a city, county, or city and county under any provision of law, including, but not limited to, Section 7 of Article XI of the California Constitution."].) And those purposes include those set forth in Section 26055, subdivision (d), which specify that BCC *cannot* approve a state license for a cannabis business, if that approval would violate the provisions of any local ordinance or regulation adopted in accordance with Section 26200.

It is black-letter administrative law that regulations that alter or amend the enabling statute, or impair its scope, are invalid, which alone requires invalidation of Regulation 5416(d). (*See ACIC, supra,* 2 Cal. 5th at 390.) But here, BCC's effort constitutes a second level of offense as well– an unconstitutional effort at amending an initiative. (*See Kelly, supra,* 47 Cal. 4th at 1026-27, 1049 [amendment includes "a legislative act that changes an existing initiative statute by taking away from it," and is invalid where not authorized by initiative].) Manifestly, if the *Legislature* could not directly accomplish what Regulation 5416(d) purports to do, BCC as an administrative agency certainly cannot do so.[29] (*Ibid.* [invalidating legislative amendment that exceeded scope allowed by Proposition 215, the Compassionate Use Act].)

The voters imposed tight restrictions on changes to Prop. 64, ensuring that they, the voters, would continue to have a direct say with respect to future changes in this emerging and controversial area. BCC has no authority and no jurisdiction to countermand this decision; only the voters can do so.[30]

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[29] *See* Section IV.C, *supra* (discussing SB 1302)

[30] The California Supreme Court, if not BCC, understands the need to honor the will of the voter:

> Our role as a reviewing court is to simply ascertain and give effect to the electorate's intent guided by the same well-settled principles we employ to give effect to the Legislature's intent when we review enactments by that body. We do not, of course, pass upon the wisdom, expediency, or policy

D. This Court Should Also Enjoin Enforcement Of Regulation 5416(d), In Addition To Declaring Its Invalidity.

Plaintiffs seek judicial declarations that: (1) Regulation 5416(d) is invalid and may not be enforced; (2) the BCC has exceeded its authority, and has no authority to preempt local control over commercial cannabis activities *within* each jurisdiction, including as to deliveries to addresses within the local jurisdiction's boundaries; and (3) the regulation does not effectuate the purpose of and in fact violates Prop. 64 and MAUCRSA.

In connection with this declaration of rights, Plaintiffs further request the Court enjoin BCC from enforcing Regulation 5416(d), *Camp v. Swoap* (1979) 94 Cal. App. 3d 733, 736, 747 [affirming permanent injunction barring enforcement of regulation], and award Plaintiffs' their reasonable attorney's fees and costs according to proof. (Code Civ. Procedure, § 1021.5; *Save Lafayette v City of Lafayette* (2018) 20 Cal.App.5th 657, 671.)

VI. CONCLUSION

Section 26200 allows a local jurisdiction to completely prohibit the operation of recreational cannabis businesses within its boundaries, and Section 26090, subdivision (e), provides that deliveries of cannabis must comply with local law. In this way, voters ensured that each locality could tailor their chosen approach to specific local needs and concerns, as well as ensure realization of local tax or revenues from all cannabis business conducted within the jurisdiction.

BCC's regulation strips away this statutorily guaranteed right of local jurisdictions to regulate commercial cannabis activity within their community. The regulation eviscerates local police and regulatory power over deliveries, and places it solely in the hands of a state-level agency, BCC. That is not what Prop. 64 contemplated and not what it permits.

By promulgating a regulation that directly conflicts with the statutory provisions

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> of enactments by the voters any more than we would enactments by the Legislature.

(*Professional Engineers, supra,* 40 Cal. 4th at 1043, internal citations, quotations omitted).

of the Business and Professions Code, the BCC and its Chief Lori Ajax have exceeded the scope of their authority. Regulation 5416(d) contradicts the law, in its plain language, purpose, and effect, and is therefore void. Plaintiffs therefore respectfully request entry of judgment in their favor.

Dated: April 13, 2020

Respectfully submitted,
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