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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF FRESNO

13  
14  
15 **COUNTY OF SANTA CRUZ, ET AL.,**  
16 Plaintiffs,  
17  
18 **v.**  
19 **BUREAU OF CANNABIS CONTROL;**  
20 **LORI AJAX, in her official capacity as**  
**Chief of the Bureau of Cannabis Control;**  
21 **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

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## INTRODUCTION

The Control, Tax and Regulate Adult-Use of Marijuana Act (“Proposition 64”) mandated the licensing agencies, including the Bureau of Cannabis Control<sup>1</sup> (“Bureau”) to promulgate regulations effectuating the purpose and intent of the initiative measure. (Bus. & Prof. Code, §§ 26013 and 26014.)<sup>2</sup> 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.).<sup>3</sup>

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.)<sup>4</sup> 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<sup>5</sup> 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:

<sup>1</sup> Referred to as the “Bureau of Marijuana Control” in Proposition 64, and later renamed as a result of Senate Bill 94 in 2017.

<sup>2</sup> All references are to the Business and Professions Code, unless otherwise indicated.

<sup>3</sup> The consolidation included changing “marijuana” to “cannabis” in all statutes.

<sup>4</sup> The Administrative Record is referenced as “AR” followed by the page number.

<sup>5</sup> The term “cannabis” is used to refer to cannabis flower and products containing cannabis.



1           **§ 5416. Delivery to a Physical Address**

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

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

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

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

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

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

17          The Plaintiffs in this case are challenging only subdivision (d) of California Code of  
18          Regulations, title 16, section 5416 (Delivery Regulation), which allows cannabis to be delivered  
19          by a licensed retail commercial cannabis business “to any jurisdiction within the State of  
20          California provided that such delivery is conducted in compliance with all delivery provisions ...”

21          (*Ibid.*) This Court should:

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

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

27                 As detailed below, the Delivery Regulation is based on the plain language of MAUCRSA,  
28                 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

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

## 6 LEGISLATIVE HISTORY

7 Cannabis was first legalized in California in 1996 and focused on medicinal patient access  
8 through Proposition 215, also known as the Compassionate Use Act (CUA). For twenty years,  
9 medicinal cannabis cultivators and medicinal retailers were subject almost exclusively to the  
10 oversight and control of local jurisdictions. CUA created a limited statute with a narrow scope  
11 by giving “only qualified patients and their primary caregivers a defense to the state crimes of  
12 marijuana possession and cultivation when that possession or cultivation is for medical  
13 purposes.” (*Conejo Wellness Center, Inc. v City of Agoura Hills* (2013) 214 Cal.App.4th 1534,  
14 1554 (*Conejo*); Health & Saf. Code, § 11362.5.) The CUA also had a limited reach into local  
15 governmental affairs as it “never expressed or implied any actual limitation on local land use or  
16 police power regulation of facilities used for the cultivation and distribution of marijuana.” (*City*  
17 *of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 26 Cal.4th 729,  
18 759-760.)

19 Control over cannabis regulation began shifting to the state level in 2004 when Senate Bill  
20 420, the Medical Marijuana Program Act (“MMPA”), was passed. (Sen. Bill No. 420 (2003-  
21 2004 Reg. Sess.)) The central purpose of the bill was to resolve “uncertainties” created by  
22 disparate regulation and enforcement in various jurisdictions and to “promote uniform and  
23 consistent application of the act among the counties within the state.” (*Id.* at § 1). As a result,  
24 the MMPA developed a state-directed program for the issuance of identification cards to  
25 qualifying medicinal cannabis patients. (Health & Saf. Code, § 11362.71 et seq.)

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

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

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

21 The MCRSA and Proposition 64 were two separate regulatory programs for cannabis.  
22 MCRSA and Proposition 64 were consolidated into the MAUCRSA, creating a comprehensive  
23 and uniform state system of medicinal and adult-use cannabis regulations. (Sen. Bill No. 94  
24 (2017-2018 Reg. Sess.) § 4.) Both the MCRSA and Proposition 64 had included provisions for  
25 the delivery of cannabis. However, the delivery provisions in the MCRSA and in Proposition 64

26 \_\_\_\_\_  
27 <sup>6</sup> The MMRSA became the Medicinal *Cannabis* Regulation and Safety Act (“MCRSA”) pursuant  
28 to Senate Bill 837 (2015-2016 Reg. Sess.).

1 were different: MCRSA’s delivery provision allowed local jurisdictions to ban retail deliveries<sup>7</sup>  
2 while Proposition 64 prohibited local jurisdictions from preventing deliveries and outlawing the  
3 purchase of cannabis.<sup>8</sup>

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

## 11 ARGUMENT

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

### 21 I. THE CASE IS NOT RIPE FOR JUDICIAL REVIEW BECAUSE NO ACTUAL 22 CONTROVERSY EXISTS

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

25 \_\_\_\_\_  
26 <sup>7</sup> Former Bus. & Prof. Code, § 19340, added by Stats, 2015, ch. 689, and repealed by Stats. 2017,  
ch. 27, § 2.

27 <sup>8</sup> Bus. & Prof. Code, §§ 26090 added by Initiative Measure (Proposition 64 § 6.1 approved Nov.  
28 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.

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

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

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

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

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

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

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

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

24  
25 <sup>9</sup> See Plaintiffs’ RJN Exhibit 13: Ceres Municipal Code section 9.120.060 requires approval of a  
26 development agreement before any Commercial Cannabis Business can be established within the  
27 jurisdiction – the ordinance is specific to physical premises within the jurisdiction (see section  
28 9.120.030.A) and makes no express or implied reference to delivery from outside the jurisdiction.

<sup>10</sup>See Plaintiffs’ RJN Exhibit 3: Angels Camp Municipal Code section 5.10.050.

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

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

10           In light of the lack of uniformity in local ordinances and the absence of any facts that have  
11 sufficiently congealed in this case, this Court cannot decide the validity of the Delivery  
12 Regulation because it is not “faced with a specific exaction.” (*Pacific Legal, supra*, 33 Cal.3d  
13 158, 170.)

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

21 \_\_\_\_\_  
22 <sup>11</sup> See Plaintiffs’ RJN Exhibit 1: Santa Cruz County Code section 7.130.050 requires any retail  
23 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.

24 <sup>12</sup> See Plaintiffs’ RJN Exhibit 4: Arcadia Municipal Code section 9101.020.040(E)(4)(a) prohibits  
25 “transportation” as well as “delivery” of all “marijuana [and] marijuana products” whether adult-  
26 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.

27 <sup>13</sup> Defendants’ object to Plaintiff’s RJN Exs. 36 through 44 based on Government Code section  
28 11350, subdivision (d) and Evidence Code sections 350-352, and 1200.

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

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

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

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

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

22 **II. STANDARD OF REVIEW**

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

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

<sup>14</sup> Defendants object to Plaintiffs RJN, Exhibits 36, 42, and 44.



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

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

21 In contrast, a court may have a somewhat more active role in reviewing a rule that is purely  
22 interpretive and “devoid of any quasi-legislative authority.” (*ACIC, supra*, 2 Cal.5th 376, 396.)  
23 In that circumstance, the court must determine “whether the administrative interpretation is a  
24 proper construction of the statute[.]” (*Ibid.*) But a court does not approach even this question on a  
25 legal blank slate. While the court takes “ultimate responsibility” for construing the statute, it  
26 “accords great weight and respect to the administrative construction [Citation].” (*Id.* at p. 397.)  
27 Even in reviewing a purely interpretive rule, the agency’s view “matters a great deal ...” (*Ibid.*)  
28

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

12 In this case, the Delivery Regulation is a “quasi-legislative” regulation subject to limited  
13 judicial review given the broad rule-making power provided by the Legislature under  
14 MAUCRSA to the Bureau to adopt implementing regulations. (Bus. & Prof. Code, §§ 26010,  
15 26013, subd. (a).) This substantive lawmaking power granted to the Bureau is further illustrated  
16 by the Legislature’s mandate that an Advisory Committee be created to “advise the licensing  
17 authorities on the development of standards and regulations pursuant to this division, including  
18 best practices and guidelines that protect public health and safety while ensuring a regulated  
19 environment for commercial cannabis activity that does not impose such barriers so as to  
20 perpetuate, rather than reduce and eliminate, the illicit market for cannabis.” (Bus. & Prof. Code,  
21 § 26014, subd (a).)<sup>15</sup> The Legislature recognized the unique nature of this new complex and  
22 highly regulated industry by requiring the careful formation of a specialized Advisory Committee,

23 <sup>15</sup> The Legislature’s mandate to the Advisory Committee is derived from Proposition 64. In  
24 passing Proposition 64, the voters authorized the convening of “an advisory committee to advise  
25 . . on the development of standards and regulations. . . including best practices and guidelines that  
26 protect public health and safety while ensuring a regulated environment for commercial cannabis  
27 activity that does not impose such barriers so as to perpetuate, rather than reduce and eliminate,  
28 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).)

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

8       Regardless of whether this Court determines that the Delivery Regulation is “quasi-  
9 legislative” or “interpretive” in nature (or a blend), the ultimate question is whether the agency  
10 has acted within the scope of the authority delegated to it by the Legislature. (Gov. Code, §  
11 11324.1.) Most importantly, the Legislature has “delegated to an administrative agency the  
12 responsibility to implement a statutory scheme through rules and regulations, the courts will  
13 interfere only where the agency has clearly overstepped its statutory authority ...” (*Ford Dealers*  
14 *Assn. v. Dept. of Motor Vehicles* (1982) 32 Cal.3d 347, 356.) Here, the Bureau acted within the  
15 scope of its authority by implementing the Delivery Regulation, which is consistent with and  
16 necessary to effectuate the purpose of MAUCRSA.

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

20       Because Plaintiffs are making a facial challenge to the validity of the Delivery Regulation,  
21 Plaintiffs can only prevail if the text of the Delivery Regulation, on its face, is inconsistent with  
22 the relevant statutes. (*PacifiCare Life & Health Ins. v. Jones* (2018) 27 Cal.App.5th 391, 403  
23 (*PacifiCare*)). In the instant case, Plaintiffs contend that the Delivery Regulation is invalid “on  
24 its face” because it “conflicts with the very statute it is supposed to implement.” (POB 9:4.)  
25 Plaintiffs do not challenge the Delivery Regulation as applied to the facts of any case. A facial  
26 challenge based on an asserted inconsistency with a statute “considers only the text” of the  
27 challenged regulation, “not its application to the particular circumstances” of this case.  
28 (*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*)).

1 Most importantly, “[a] facial challenge is ‘the most difficult challenge to mount  
2 successfully, since the challenger must establish that no set of circumstances exists under which  
3 the [law] would be valid [Citation].’” (*PacifiCare, supra*, 27 Cal.App.5th 391, 403.) This standard  
4 is “exacting.” (*Today’s Fresh Start, supra*, 57 Cal.4th 197, 218 [constitutional facial challenge].)  
5 The challenger must show that the challenged regulation “inevitably pose[s] a present total and  
6 fatal conflict’ with applicable prohibitions [Citation].” (*T.H. v. San Diego Unified School Dist.*  
7 (2004) 122 Cal.App.4th 1276, 1281.) As discussed below, Plaintiffs cannot meet their burden to  
8 show that “no set of circumstances exists” under which the Delivery Regulation would be valid.  
9 (*PacifiCare, supra*, 27 Cal.App.5th 391, 403.) Consequently, the Court should reject Plaintiffs’  
10 analysis relating to the alleged impropriety of the Bureau’s creation of the Delivery Regulation.

### 11 **III. THE DELIVERY REGULATION IS CONSISTENT WITH AND DOES NOT CONFLICT** 12 **WITH MAUCRSA AND IS REASONABLY NECESSARY TO EFFECTUATE THE** 13 **PURPOSE OF MAUCRSA**

#### 14 **A. Statutory Interpretation Supports Validity of the Delivery Regulation**

15 The Delivery Regulation is presumed valid because the Legislature conferred on the Bureau  
16 broad authority to adopt the Delivery Regulation to carry out MAUCRSA. (Gov. Code, §§  
17 11324.1, 11342.2; Bus. & Prof. Code, §§ 26010, 26013, subd. (a); *ACIC, supra*, 2 Cal.5th 376,  
18 396.) The Bureau set forth its interpretation of MAUCRSA in the Delivery Regulation, which is  
19 entitled to “great weight” and was adopted pursuant to the Administrative Procedure Act. (*ACIC,*  
20 *supra*, 2 Cal.5th 376, 397.) In reviewing MAUCRSA through a lens with considerable deference  
21 to the Bureau, this Court should find that the Delivery Regulation conforms with MAUCRSA  
22 based on the plain text of the statutes and reading the statutory framework as a whole. As  
23 discussed below, local control is not absolute in the context of licensed commercial cannabis  
24 delivery by a licensee to a consumer: MAUCRSA prohibits local jurisdictions from banning  
25 delivery by cannabis businesses that are licensed in other jurisdictions.

#### 26 **1. The Text of MAUCRSA Supports the Delivery Regulation**

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

1 This division shall not be interpreted to supersede or limit the authority of a local  
2 jurisdiction to adopt and enforce local ordinances to regulate businesses licensed  
3 under this division, including, but not limited to, local zoning and land use  
4 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.*

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

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

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

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

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

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

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

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

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

18 According to Plaintiffs, section 26090 does not mean what it says. In their view, while the  
19 provision expressly states that “[a] local jurisdiction shall not prevent delivery of cannabis or  
20 cannabis products,” it actually gives local jurisdictions absolute and unfettered power to ban local  
21 deliveries. Plaintiffs base this bizarre reading on the reference at the end section 26090 to local  
22 laws adopted under section 26200. But they do not—and cannot—offer any reason why the  
23 Legislature would have stated at the beginning of section 26090, subdivision (e), that local  
24 jurisdictions “shall not prevent delivery” when it intended to allow local jurisdictions to totally  
25 ban delivery of cannabis. The Court should reject Plaintiffs’ construction of section 26090  
26 because “[w]ell-established canons of statutory construction preclude a construction [that] renders  
27 a part of a statute meaningless or inoperative.” (*Copley Press, Inc. v. Super. Ct.* (2006) 39 Cal.4th  
28 1272, 1285.) A statute cannot in the same breath state that “a local jurisdiction *shall not prevent*

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

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

18 Finally, Section 26200 does not save Plaintiffs. It is unlikely that the Legislature would  
19 have drafted section 26090 to expressly state that local jurisdictions “shall not prevent delivery of  
20 cannabis or cannabis products” but then given them precisely that authority by referencing  
21 Section 26200 at the end. As the Supreme Court has recognized, “drafters of legislation ‘do  
22 not. . .hide elephants in mouseholes.’” (*Cal. Redevelopment Assn. v. Matosantos* (2011) 53  
23 Cal.4th 231, 261, quoting *Whitman v. American Trucking Assns., Inc.* (2001) 531 U.S., 457, 468.)  
24 In addition, while section 26200 recognizes that local jurisdictions may prohibit the establishment  
25

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26 <sup>16</sup> As detailed in subsection B below, this is what was said in former Business and Professions  
27 Code section 19340, subdivision (a): “Deliveries can only be made ... in a city, county, or city  
28 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.)

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

3 Thus, Section 26200 is easily reconciled with Section 26090 by interpreting the former to  
4 grant local governments authority to regulate and even ban any commercial cannabis businesses,  
5 including retail delivery businesses that are established and operate *within the local jurisdiction*,  
6 but not to ban or prevent businesses that are established and operate in other jurisdictions from  
7 making deliveries. In other words, if a delivery by a licensed business begins in a jurisdiction in  
8 which it is licensed but ends in another jurisdiction, section 26090 prohibits the other jurisdiction  
9 from banning the delivery, though the jurisdiction may ban businesses within the jurisdiction  
10 from making deliveries as well as impose reasonable regulations on deliveries under section  
11 26200, subdivision (a)(1).

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

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

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

- 27 1) Local regulations can significantly limit the methods and location of personal  
28 cultivation;



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

3 3) Local jurisdictions are free to pass laws that protect the right of individuals and  
4 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  
5 owned property.”

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

6 MAUCRSA also contains express and implied limits on local regulatory authority. It  
7 provides that local jurisdictions “shall not prevent transportation of cannabis or cannabis products  
8 on public roads by a licensee” in compliance with the statute’s requirements (Bus. & Prof. Code,  
9 § 26080, subd. (b)), and “shall not prevent delivery of cannabis or cannabis products on public  
10 roads by a licensee” in compliance with such requirements. (Bus. & Prof. Code, § 26090, subd.  
11 (e).) Even more fundamentally, MAUCRSA states that it “shall not be unlawful under ... local  
12 law to ... purchase [or] obtain” cannabis or cannabis products. (Health & Saf. Code, § 11362.1,  
13 subd. (a).)

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

23 The objectives of Propositions 64, set out in Section 3, include taking the “production and  
24 sales out of the hands of the illegal market and bring them under a regulatory structure,” reduction  
25 of “barriers to entry into the legal, regulated market,” creation of a thriving commercial  
26 marketplace that would “[g]enerate hundreds of millions of dollars in new state revenue annually  
27 for restoring and repairing the environment, youth treatment and prevention, community  
28

1 investment, and law enforcement,” and the right for adults to “use, possess, purchase, and grow  
2 cannabis.” (Plaintiffs’ RJN, Ex. 46 [Ballot Pamp., Primary Elec. (Nov. 8, 2016) text of Prop. 64,  
3 pp. 179-180].) All of these objectives would be totally obstructed if local jurisdictions could  
4 unilaterally impede statewide commercial activity. When “otherwise valid local legislation  
5 conflicts with state law, it is preempted by such law and is void.” (*O’Connell v. Stockton* (2007)  
6 41 Cal.4th 1061, 1067; see also *T-Mobile West LLC. v. City and County of S.F.* (2019) 6 Cal. 5th  
7 1107, 1123 “[A] local law would be displaced if it hinders the accomplishment of the purposes  
8 behind state law.”].)

9         Permitting local jurisdictions to ban all deliveries of cannabis products would turn this  
10 structure on its head. If local jurisdictions were permitted not only to prohibit the establishment  
11 and operation of businesses within their jurisdiction, but also to ban businesses licensed to operate  
12 in other jurisdictions from delivering cannabis, the expressly recognized right of individuals in  
13 that jurisdiction to purchase cannabis in spite of local laws would be severely undercut. This is  
14 especially true in large counties such as Inyo or San Bernardino, which encompass more than  
15 10,000 and 20,000 square miles respectively, where, as a practical matter, many consumers may  
16 be unable to drive to another jurisdiction permitting cannabis businesses.

17         Permitting local jurisdictions to ban all deliveries of cannabis also would undermine the  
18 stated objectives of Propositions 64. The proposition was intended to create a “comprehensive  
19 system to legalize, control and regulate ... nonmedical marijuana.” (Plaintiffs’ RJN, Ex. 46  
20 [Ballot Pamp. Primary Elec. (Nov. 8, 2016) text of Prop. 64, p. 179].) Its stated objectives  
21 include not only securing the right of adults to “use, possess, purchase, and grow cannabis,” but  
22 also taking the “production and sales out of the hands of the illegal market and bring[ing] them  
23 under a regulatory structure.” (*Id.* pp. 179-180.) These objectives would be undercut if local  
24 jurisdictions could unilaterally impede statewide commercial activity. For example, if whole  
25 swaths of the state could totally outlaw commercial cannabis transactions, the right of access  
26 guaranteed by Proposition 64 would become effectively meaningless in those areas. Similarly, if  
27 legal transactions were not allowed in those jurisdictions, only illicit sales would occur there, the  
28

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

3 **B. The Legislative History Confirms the Interpretation Underlying the**  
4 **Delivery Regulation**

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

12 (a) Deliveries, as defined in this chapter, can only be made by a dispensary and  
13 in a city, county, or city and county that does not explicitly prohibit it by local  
ordinance.

14 (b) Upon approval of the licensing authority, a licensed dispensary that delivers  
15 medical cannabis or medical cannabis products shall comply with both of the  
following:

16 (1) The city, county, or city and county in which the licensed dispensary is  
17 located, and in which each delivery is made, do not explicitly by ordinance prohibit  
delivery, as defined in Section 19300.5.

18 ...

19 (f) A local jurisdiction shall not prevent carriage of medical cannabis or medical  
20 cannabis products on public roads by a licensee acting in compliance with this  
chapter.

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

23 In sharp contrast, Proposition 64 guaranteed the right of all Californians to “obtain” and  
24 “purchase” adult-use cannabis and explicitly prohibited local jurisdictions from “preventing  
25 deliveries” by licensees acting in conformity with state and local regulations. (Plaintiffs’ RJN, Ex.  
26 46 [Ballot Pamp. Primary Elec. (Nov. 8, 2016) text of Prop. 64, pp. 180, 192].) Even more  
27 importantly, in consolidating Proposition 64’s regulation of adult-use and MCRSA’s medicinal  
28

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

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

#### 14 **C. The Delivery Regulation Is Reasonably Necessary**

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

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

1 4, in support of the proposed Delivery Regulation, in its initial form.<sup>17</sup> The concerns expressed  
2 by interest groups, policy makers, and the public focused on two general categories. The first  
3 category related to the need for clarity for consumers and licensed businesses to enable them to  
4 participate in a functional statewide market. This was necessary because, absent this clarification,  
5 it would be difficult, if not impossible, to navigate the numerous laws and ordinances if  
6 compliance with state regulations also required compliance with the local rules in the 482 cities  
7 and 58 counties in California. (AR004304). The second category expressed the concern that  
8 “cannabis deserts” would result from the large numbers of local jurisdictions banning all cannabis  
9 retail activities. (AR002195.) If local jurisdictions can create obstacles to the implementation of a  
10 comprehensive statewide marketplace, they also can interfere with the express policy goals of  
11 Proposition 64 such as consumer access, the elimination of the illicit market, development of a  
12 thriving statewide industry, and generation of significant tax revenue. (AR002300 - AR002323,  
13 AR002504 - AR002509, AR002578 - AR002607, AR002756 - AR007884, AR007994 -  
14 AR009194, AR009228 - AR0010069.)

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17 <sup>17</sup> Defendants’ RJN, Ex. A, pp. 7, 9, and 12 [Cannabis Advisory Committee Meeting Minutes  
18 dated November 16, 2017: questions regarding delivery limits, whether delivery was for  
19 medicinal cannabis only, and the amount of product that could be carried by a delivery driver];  
20 Defendants’ RJN, Ex. B, pp. 16-17 [Cannabis Advisory Committee Meeting Minutes dated  
21 March 15, 2018: comments regarding needing more secured vehicles that can carry more product,  
22 not having limits on the price of what can be carried, un-enclosed vehicles or two-wheeled  
23 vehicles, clarification of the regulations to clearly require age verification of the recipient at the  
24 time of delivery, opportunity for deliverers to go into the elder care communities, allowing  
25 deliverers to rely on a doctor’s recommendation, and doing everything to help patients];  
26 Defendants’ RJN, Ex. C, p. 4 [Cannabis Advisory Committee Meeting Minutes dated July 19,  
27 2018: “illegal operations and unlicensed businesses such as delivery operations are the biggest  
28 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.”

1           The Delivery Regulation addresses the first category of concerns by clarifying what retail  
2 delivery licensees are permitted to do in the framework of the regulations. Specifically, the  
3 Delivery Regulation was “amended to clarify that a delivery employee may deliver to any  
4 jurisdiction within the State of California provided that such a delivery is conducted in  
5 compliance with all delivery provisions of the regulations.” (AR001572; Cal. Code Reg., tit. 16, §  
6 5416, subd. (d).) It also deals with the second set of concerns by clarifying that local police  
7 power cannot be used to ban cannabis deliveries by properly licensed businesses: “Local  
8 jurisdictions have the ability to regulate commercial cannabis businesses operating in their  
9 jurisdiction. However, the Act does not allow a local jurisdiction to prevent delivery on public  
10 roads.” (AR001107.)

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

21           The regulation is necessary because, without the assurance of the Delivery Regulation,  
22 licensed retailers would not know whether they could accept orders within the regions where they  
23 operate. The Bureau’s actions in promulgating the Delivery Regulation were not arbitrary,  
24  
25

26 <sup>18</sup> See Plaintiffs’ RJN Exs. 4, 15, and 27.

27 <sup>19</sup> See Defendants’ RJN, Exs. F, G, H, and I.

1 capricious, or irrational. The Bureau acted reasonably and out of necessity in setting forth a  
2 regulation that provided necessary clarity in the area of cannabis delivery.<sup>20</sup>

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

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

9 **A. The Delivery Regulation Does Not Unlawfully Preempt Local Laws**

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

18 Indeed, the lines between local police powers and the general laws of the state were  
19 completely redrawn when Proposition 64 created and defined, for the first time, local control  
20 relating to adult-use cannabis. For example, after Proposition 64, every local ban on cultivation  
21 was invalidated to the extent it did not allow cultivation of six plants indoors or in accessory  
22 structures. (Former Health & Saf. Code, § 11362.2, subd. (b)(1), added by Initiative Measure  
23 (Prop. 64 § 4.5, and Amended by Stats. 2017, ch. 27 S.B. 94 § 130.) Likewise, all local  
24 ordinances prohibiting the possession or use of cannabis were invalidated. (Health & Saf. Code,  
25

26 \_\_\_\_\_  
27 <sup>20</sup> Defendants’ RJN Ex. E [Cannabis Advisory Committee Meeting Minutes dated June 28, 2019]  
28 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.

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

5 As discussed above, Proposition 64 and MAUCRSA expressly granted certain authorities to  
6 local jurisdictions and contained express limitations on the exercise of local authority.  
7 Additionally, local jurisdictions are subject to implied limitations because they may not pass any  
8 ordinance that either directly conflicts with a state law or undermines the purpose of a state  
9 statutory scheme. “A local ordinance contradicts state law when it is inimical or cannot be  
10 reconciled with state law.” (*Sherwin Williams Co. v. City of L.A.* (1993) 4 Cal.4<sup>th</sup> 893, 897-9-  
11 8978.) Therefore, Plaintiffs’ total bans on delivery by licensees from other jurisdictions are  
12 preempted and void.

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

14 Plaintiffs also argue that the Delivery Regulation contradicts the California Constitution  
15 and a “long history in this State of local authority over police and land use matters of this sort.”  
16 (POB, p. 40:3 - 4). It would, however, be an extremely unusual exercise of local zoning or police  
17 power to prevent deliveries on public roads of medicine from an online pharmacy, boxes of wine  
18 from a wine club, or a vaporizer from Amazon.com. Principles which prohibit the exercise of  
19 local police powers to regulate the operation of businesses that are situated in other jurisdictions  
20 or that interfere with interjurisdictional commerce are long established. A local jurisdiction has  
21 inherent power to determine appropriate uses of land *within* its jurisdiction (Plaintiffs’ RJN, Ex.  
22 46 [Ballot Pamp., Primary Elec. (Nov. 8, 2016) text of Prop. 64, p. 182]), but cannot make those  
23 same determinations for businesses outside of their jurisdictional limits. (See *City of Oakland v.*  
24 *Brock* (1937) 8 Cal.2d 639, 641.)

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



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

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

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

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27 ///

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

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

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

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

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

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

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

19 The burden is on the Plaintiffs to overcome the presumptive validity of the Delivery  
20 Regulation. (*ACIC, supra*, 2 Cal.5th 376, 389 and *Chamber of Commerce, supra*, 10 Cal.App.5th  
21 604, 620.) In order to overcome this presumption, Plaintiffs must demonstrate that there are no  
22 circumstances under which the delivery regulation could be valid. (*PacifiCare, supra*, 27  
23 Cal.App.5th 391,403.) Even though this is the fundamental requirement for prevailing in a facial  
24 challenge to a regulation, Plaintiffs have not expressly made this allegation. In their complaint  
25 and brief, the only thing that Plaintiffs have done is offer up an alternative construction of section  
26 26090, subdivision (e). As shown above, Plaintiffs’ interpretation is both internally contradictory  
27 and relies exclusively on a narrow reading of one subdivision (section 26200, subdivision (a)),  
28 while ignoring all other features of Proposition 64 and MAUCRSA.

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

13           As noted above, the Court’s focus should be on the relevant legislative actions. Here,  
14 there are at least four legislative *actions* that the Court could look to discern the intent of the  
15 legislature and the voters. First, California voters enacted Health and Safety Code section  
16 11362.1 which prohibits local ordinances that would make it unlawful for residents to “purchase”  
17 and “obtain” cannabis. Second, the voters enacted Section 26090 prohibiting local jurisdictions  
18 from preventing deliveries on public roads (subject to permissible local regulations). Third, the  
19 Legislature repealed and did not replace former Business and Professions Code section 19340,  
20 which authorized local jurisdictions to ban retail delivery of medicinal cannabis. Fourth, the  
21 voters enacted Business and Professions Code Sections 26013 and 26014 which delegated  
22 rulemaking powers to carry out the quasi-legislative function of developing regulations to  
23 implement, administer, and enforce Proposition 64 and MAUCRSA.

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

27 \_\_\_\_\_  
28 <sup>21</sup> Plaintiffs’ Complaint Paragraph 39 “Regulation 5416(d) suddenly appeared in the third  
rulemaking package.”

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

3 **CONCLUSION**

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

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

16 Dated: June 8, 2020

Respectfully Submitted,

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