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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

COUNTY OF SANTA CRUZ, ET AL., Plaintiffs, vs. BUREAU OF CANNABIS CONTROL; LORI AJAX, IN HER OFFICIAL CAPACITY AS CHIEF OF THE BUREAU OF CANNABIS CONTROL, AND DOES 1 THROUGH 10, INCLUSIVE, Defendants.	CASE NO. 19CECG01224 **[PROPOSED] AMICUS CURIAE BRIEF** TRIAL DATE: AUGUST 6, 2020 TIME: 8:30 A.M. DEPT: 502 JUDGE: HON. ROSEMARY T. MCGUIRE ACTION FILED: APRIL 4, 2019

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I. INTRODUCTION

At its core, this action presents an issue of statutory interpretation of an initiative statute that is as simple as it is narrow. That issue, stripped of the interesting but largely irrelevant history and genesis of Proposition 64, Senate Bill 94, the regulations of Title 16, and the myriad ordinances and other extrinsic materials presented by the parties to the court, is whether Section 26200(a)(1)[1] grants a local jurisdiction the authority to prohibit delivery of cannabis goods to persons within their jurisdictions. If it does not (and it does not), then Regulation 5416(d),[2] authorizing delivery to any jurisdiction in California, is not in conflict with Section 26200(a)(1), was lawful when adopted, and Plaintiffs' request that it be enjoined is without merit and should be denied.

Notably, Plaintiffs understand quite well the very words that should have been used in Section 26200(a)(1) for it to actually grant local jurisdictions the authority Plaintiffs claim it does. Plaintiffs made the point clearly at 10:15-18 of their Reply Brief:

> Localities maintain under Section 26200 unfettered local control with respect to ***commercial cannabis activity*** within their borders. That's what the statute says, and that's what the voters approved. Regulation 5416(d) cannot stand in view of the plain language of Section 26200, subdivision (a)(1). (*Emphasis added.*)

The problem for Plaintiffs, however, is that Section 26200(a)(1) does ***not***, in fact, say what Plaintiffs say it does. Specifically, and critically, Section 26200(a)(1) does not use the term "commercial cannabis activity" when describing the conduct local jurisdictions may prohibit. As will be discussed, the omission is significant and directly indicates the voters' intent to limit the authority of local jurisdictions and not enable them to prevent the delivery of cannabis goods.[3]

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[1] Cal. Business and Professions Code.

[2] Section 5416(d), Title 16, California Code of Regulations, referred to herein as "Regulation 5416(d)."

[3] Spoiler Alert: "Commercial cannabis activity" is a defined term (Section 26001(k)) that embraces a comprehensive list of cannabis-related conduct and, especially pertinent to the case at bar, includes an express reference to "delivery." Moreover, it cannot reasonably be argued that Section

The established rules for interpreting an initiative statute are straightforward:

> When we interpret an initiative, we apply the same principles governing statutory construction. We first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure.

(*People v. Superior Court (Pearson)* (2010) 48 Cal. 4th 564, 571.)

Thus, the court's primary task is to carefully read and consider the statute at issue. Putting an even finer point on it, Justice Anderson, in a dissent joined by Justice Mosk, instructed that "legislative intent should be discerned from the words actually used – and the words not used – by the Legislature in enacting statutes." *People v. Cruz* (1996) 13 Cal.4th 764, 785-86.

Consistent with the above-stated rules, and focusing entirely on the language of the two statutes in question while staying within the four corners of the language of the two statutes and the initiative itself, *amicus curiae*, HK Cannabis Law, ("*amicus*") hereby respectfully submits this brief for the Court's consideration and possible assistance. The brief is being submitted on behalf of the defendants and is based upon *amicus'* position that Plaintiffs' claim is without merit and that both the declaratory and injunctive relief sought should be denied.

II. PLAINTIFFS' CONTENTIONS

Plaintiffs contend that Section 26200(a)(1) grants a local jurisdiction the authority to prohibit the delivery of cannabis goods to persons within their jurisdictions. Specifically, Plaintiffs contend that under and by virtue of Section 26200(a)(1), and as allegedly confirmed by Section 26090(e), local jurisdictions possess plenary authority to prohibit all commercial cannabis activity, including deliveries, within their jurisdictions. Based upon those contentions, Plaintiffs

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26200(a)(1)'s failure to use the term "commercial cannabis activity" was an oversight. It wasn't. Both the term and its definition were well known to the voters and the drafters of Section 26200(a)(1) because it *was* used and approved, just a few inches down, in subsection (c) of the same code section as follows: "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." *Emphasis added.*

claim that Regulation 5416(d), which authorizes the delivery of such goods to "any jurisdiction within the State of California," is inconsistent with Plaintiffs' statutory authority, that the Bureau of Cannabis Control should not have adopted the regulation, that the regulation is unlawful, and that its enforcement should be permanently enjoined.

III. AMICUS' POSITION

Plaintiffs' assertion that Section 26200(a)(1) grants them the authority to prohibit deliveries of cannabis goods to persons within their jurisdictions (and that Section 26090(e) confirms this) is without merit and wrong. The language and structure of Section 26200(a)(1), both alone and in the context of Section 26200 and Prop. 64 as a whole, demonstrates that section 26200(a)(1)'s grant of authority to a local jurisdiction to prohibit cannabis-related conduct: (a) is limited, not plenary, (b) extends only to "the establishment or operation" of a cannabis business and not to all "commercial cannabis activity", and (c) extends only to cannabis businesses that are licensed within that local jurisdiction. Separately, by its terms, Section 26090(e) not only does not grant or confirm in local jurisdictions any authority to prevent the delivery of cannabis goods, but it instead specifically imposes an express restriction against a local jurisdiction that seeks to prevent such deliveries when they are being made by a retailer that is in compliance with both state law and the local law of the local jurisdiction in which it is licensed.

Thus, contrary to Plaintiffs' contentions, Section 26200(a)(1) does not grant, and local jurisdictions do not have, the authority to prevent or prohibit the delivery of cannabis goods to persons within their jurisdictions. Regulation 5416(d) is fully consistent with Sections 26200(a)(1) and 26090(e), has at all times been lawful, and Plaintiffs' claims for declaratory and injunctive relief are without merit and should be denied.

IV. STATEMENT OF FACTS

In 2016, California voters approved the initiative measure known as Proposition 64, which became the Control, Regulate and Tax Adult Use of Marijuana Act ("Prop. 64" or "AUMA"). AUMA included Section 26200(a), which, when adopted, read as follows:

> 26200. (a) Nothing in this division shall 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.

In 2017, the California Legislature passed the Medicinal and Adult-Use Cannabis Regulation and Safety Act ("S.B. 94" or "MAUCRSA"). As a result, section 26200(a) was amended slightly but not substantively, was renumbered as section 26200(a)(1), and now reads as follows:

> 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.

In 2016, AUMA also included Section 26090(c), which, when adopted, read as follows:

> 26090. (c) A local jurisdiction shall not prevent delivery of marijuana or marijuana products on public roads by a licensee acting in compliance with this division and local law as adopted under Section 26200.

In 2017, section 26090(c) was amended slightly but not substantively, was renumbered as section 26090(e), and now reads as follows:

> 26090. (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.

In January 2019, in accordance with Section 26013, the Bureau of Cannabis Control adopted a comprehensive set of regulations to address multiple issues involved in the implementation of California's cannabis laws. Among them is Section 5416(d), the regulation Plaintiffs are challenging by this action, which reads as follows:

> 5416. (d) A delivery employee may deliver to any jurisdiction within the State of California provided that such delivery is conducted in compliance with all delivery provisions of this division.

Plaintiffs are a group of local jurisdictions, with "local jurisdiction" being defined as "a city, county, or city and county." (Section 26001(ac).)

"Commercial cannabis activity" is a defined term that "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." (Section 26001(k). (*Emphasis added.*)

Throughout Division 10 (Cannabis) of the Business and Professions Code, the term "this division" is used to refer to the code sections that comprise Division 10. (Section 26000(a).)

V. DISCUSSION

A. Section 26200(a)(1) Is A Grant Of Only Limited Authority And Does Not Authorize A Local Jurisdiction To Prohibit The Delivery Of Cannabis Goods To Persons Within Its Jurisdiction.

To understand that Section 26200(a)(1) grants only limited authority to local jurisdictions to prohibit conduct related to cannabis businesses within their jurisdictions, it is helpful to consider key aspects of the subsection and to do so in the context of well-established rules of statutory interpretation. It may also be helpful, for demonstrative and illustrative purposes only, to recast the statute in the manner that Plaintiffs appear to be reading it, or that it must read, for Plaintiffs to have a meritorious claim.[4]

When interpreting a statute, it is necessary to have its terms well in mind. For convenience, therefore, we repeat the language of Section 26200(a)(1) here, noting that it is comprised of two "prongs," as more fully discussed and examined below:

> 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. (*Emphasis added.*)

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[4] As the Supreme Court has emphasized, however, the judiciary's role in determining the meaning of a statute " ' "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted ...." [Citation.] We may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used.' [Citation.]" (*People v. Leal* (2004) 33 Cal.4th 999, 1008, 16 Cal.Rptr.3d 869, 94 P.3d 1071.)

Focused on the words used and not used by the drafters of Section 26200(a)(1), and as approved by the voters, *amicus* respectfully offers the following observations regarding subsection (a)(1) of the statute:

- The first prong concerns a local jurisdiction's authority "to regulate"
- The second prong describes the scope and extent of a local jurisdiction's authority "to prohibit"
- The second prong identifies the cannabis business conduct that a local jurisdiction may prohibit and does so using the words "the establishment or operation of"
- Neither prong makes reference to or uses the term "commercial cannabis activity"
- Unlike Section 26200(a)(1), subsection (c) of section 26200 *does* make reference to and use the term "commercial cannabis activity"
- The first prong does *not* include the phrase "within the local jurisdiction" whereas the second prong *does*, placing it after the words "licensed under this division," not after either the words "prohibit" or "the establishment or operation"
- The second prong ends thus with the words "licensed under this division within the local jurisdiction"
- Neither subsection (a)(2) nor (b) of section 26200 use or include the phrase "within the local jurisdiction"
- While Section 26200(c) does use the phrase "within the local jurisdiction" it does so in conjunction with words referencing *local licensing*, specifically "a *license* to engage in commercial cannabis activity within the local jurisdiction"

Notwithstanding that Section 26200(a)(1) omits the term "commercial cannabis activity" in both of its two prongs, Plaintiffs nevertheless assert in their Trial Brief at 9:9-10 that:

> "[i]n approving Prop. 64 in 2016, California's voters *expressly* protected the existing regulatory authority of cities and counties over ***commercial cannabis activity***."

(*Bold emphasis added, standard emphasis in original.*) And, as noted above, they make the following proclamation in their Reply Trial Brief at 10:15-17:

> Localities maintain under Section 26200 unfettered local control with respect to ***commercial cannabis activity*** within their borders. That's what the statute says, and that's what the voters approved.

(*Bold emphasis added*.)

But, as should be now be quite clear, Section 26200(a)(1) does not say what Plaintiffs say it does - it never uses nor makes reference to the term "commercial cannabis activity." Instead, the subsection only refers to a local jurisdiction's authority to prohibit "the establishment or operation of" a cannabis business and, even then, only those that are licensed within that local jurisdiction.

Why is this significant? Because there is a material difference between the phrase "the establishment or operation of" a cannabis business, meaning the "formation" or later "running" of that business, and the defined term "commercial cannabis activity", which is broadly defined at Section 26001(k) to specifically include "delivery" in its definition.

It is also significant because, to ignore the fact that the term "commercial cannabis activity" was *omitted* from subsection (a)(1), while it was contemporaneously *included* in subsection (c) of the same code section, would contravene a fundamental rule of statutory construction. As the California Supreme Court has said:

> This approach contravenes the principle that ***"when different words are used in contemporaneously enacted, adjoining subdivisions of a statute, the inference is compelling that a difference in meaning was intended.***" (*People v. Jones* (1988) 46 Cal.3d 585, 596, 250 Cal.Rptr. 635, 758 P.2d 1165, italics omitted; see also *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117, 81 Cal.Rptr.2d 471, 969 P.2d 564 ["[w]here different words or phrases are used in the same connection **631 in different parts of a statute, it is presumed the Legislature intended a different meaning"].)

(*Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal. 4th 334, 342–43, *emphasis added*.)

Moreover, and again from the Supreme Court:

> "'[W]hen the Legislature has carefully employed a term in one place and has excluded it in another, ***it should not be implied where excluded***.' " (*Citations*.)

(Wasatch Prop. Mgmt. v. Degrate (2005) 35 Cal. 4th 1111, 1117–18, *as modified* (July 27, 2005), *emphasis added*.)

Accordingly, under these well-established and logical rules, there is no question but that the term "the establishment or operation of" has a different (and more limited) meaning than the defined term "commercial cannabis activity," with the latter being comprehensive and making specific reference to "delivery." Nor under the circumstances, and according to the Supreme Court, may the term "commercial cannabis activity" even be "implied" in Section 26200(a)(1). That said, had the drafters or the voters intended that local jurisdictions be granted the authority to prohibit the delivery of cannabis goods within their jurisdictions, there is no question but that the term "commercial cannabis activity" would have been used in Section 26200(a)(1). Plaintiffs understand this, clearly agree with it, and have argued it, but their argument lacks support from the most importance source and indication of voter intent…Section 26200(a)(1) itself.

To further illustrate the point, had the voters intended that local jurisdictions have the authority to prohibit the delivery of cannabis goods to persons within their jurisdictions, the actual language of the statute, in relevant part, would not have been written and approved as follows…

> 26200. (a)(1) ***, *or to completely prohibit the establishment or operation of one or more types of businesses licensed under this division within the local jurisdiction.*

…but would instead have been written and approved as follows…

> 26200. (a)(1) ***, *or to completely prohibit* ***commercial cannabis activity*** *within the local jurisdiction.*

But the latter variant is not what the drafters wrote nor what the voters approved. Instead, Section 26200(a)(1), as written and approved, omitted the term "commercial cannabis activity" in subsection (a)(1), while contemporaneously using it in subsection (c). In so doing, the drafters and voters manifested their clear intent not to empower local jurisdictions with the authority to prohibit all commercial cannabis activity, including but not limited to "delivery."[5]

[5] And, indeed, this is fully consistent with what the voters were told by the Legislative Analyst in the 2016 Official Voter Information Guide for Prop. 64. There, in words notably devoid of any qualifiers, conditions, exceptions, or equivocation, the Legislative Analyst explained that the intent of Prop. 64 was that "adults age 21 and over would be able to purchase marijuana at state licensed

Understandably stymied by the drafters' choice of terms in Section 26200(a)(1), and the voters' approval of them, Plaintiffs have also pursued a fallback position, this one attempting to endow the word "operation", as used in Section 26200(a)(1), with a technical meaning that it was clearly not intended to have.[6] The effort fails for several reasons.

First, it is clear from Section 26200(a)(1) that the word "operation" was used in its ordinary non-statutorily defined sense, namely, meaning "to run", "function", or "be active." Nor is this the only time or place where the word "operation" was or is used in its ordinary sense. For example, in a contemporaneous use made in Prop. 64's original definition of "Unreasonably impracticable," which appeared in the approved initiative at Section 26001(dd), the word "operation" is similarly used in its ordinary sense, there to mean "running" a cannabis business

> 26001. (dd) "Unreasonably impracticable" means that the measures necessary to comply with the regulations require such a high investment of risk, money, time, or any other resource or asset, that the operation of a marijuana establishment is not worthy of being carried out in practice by a reasonably prudent business person.

There are also other instances in Division 10 (Prop. 64 and S.B. 94) where the word "operation" is used in its ordinary sense. For example, see Sections 26045(a) and (f) ["operation or execution" of an order], 26055(c) ["business operation"], and 26070(d) ["operation" of vehicles"].) For instances where the term is used in its technical and defined sense, see Sections 26038(a) "each day of operation shall constitute a separate violation"], 26052.4(b) ["prior operation in the local jurisdiction"] and 26052.4(c) ["operation in compliance"].)

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businesses ***or through their delivery services***." (Official Guide at p. 92.) Not coincidentally, those are precisely the rights implemented and protected by Sections 26200(a)(1) and 26090(e).

[6] "Operation, as defined in Section 26001(ak), "means any act for which licensure is required under the provisions of this division, or any commercial transfer of cannabis or cannabis products." In Prop. 64, the definition appeared at section 26001(w) and was similarly defined, the only difference being the "marijuana" was used in place of "cannabis".

Nor is it unusual for a word or term otherwise defined in a statute to also be used in a non-defined manner elsewhere in the statute. When that occurs, the rule is that the presumption of consistent usage readily yields to context. As the Ninth Circuit recently noted in *Pakootas v. Teck Cominco Metals, LTD.* 830 F.3d 975, 984 (9th Cir. 2016):

> The Supreme Court teaches that, even when the same word is used in different provisions of the same statute, the word does not necessarily have to be interpreted identically. *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 575–76, 127 S.Ct. 1423, 167 L.Ed.2d 295 (2007). Rather, "the presumption of consistent usage 'readily yields' to context, and a statutory term—even one defined in the statute—'may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.' " *Util. Air Regulatory Grp. v. EPA*, —— U.S. ——, 134 S.Ct. 2427, 2441, 189 L.Ed.2d 372 (2014) (quoting *Duke Energy Corp.*, 549 U.S. at 574, 127 S.Ct. 1423).

In Section 26200(a)(1), the word "operation" was used in its ordinary sense, as was the accompanying word "establishment."[7] Given the plain meaning and ordinary usage of the words, the phrase "the establishment or operation of" is simply a way of denoting, first, the formation or starting of a business and, second, the running of it thereafter. Thus, under Section 26200(a)(1), a local jurisdiction could prohibit the formation or start-up of a cannabis business within its jurisdiction, or, once formed or started up, the local jurisdiction could shut it down.

Had the drafters and voters intended that local jurisdictions be authorized to prohibit the delivery of cannabis goods to persons within their jurisdictions, Section 26200(a)(1) would have said so. It could have done it by using the word "delivery", which already had a code section of its own in section 26090(e). Or it could have done it by using the term "commercial cannabis activity," a term well known to the drafters and voters (it was, in fact, used and approved in subsection (c) of

[7] With regard to the ordinary meaning of the words "establishment" and "operation", The New Oxford American Dictionary (2001), at page 580, defines "establishment" as "the action of establishing something or being established" and defines "establish" as "set up" as in "to initiate or bring about." The same dictionary, at page 1200, defines "operation" as "the fact or condition of functioning or being active" with the usage example being "the construction and operation of power stations." It is difficult to imagine more precisely applicable definitions for the words "the establishment or operation of" as they appear and were used in Section 26200(a)(1).

Section 26200) whose definition expressly referred to and incorporated the conduct of "delivery." Or it could have been done by using the word "operation" in its technical sense, rather than in its ordinary sense. But none of these things occurred because the voters never intended Section 26200(a)(1) to authorize local jurisdictions to be able to prohibit the delivery of cannabis goods to persons in their jurisdictions.

B. By Its Terms, Section 26200(a)(1)'s Grant Of Authority To A Local Jurisdiction To Prohibit The Conduct Of A Cannabis Business Extends Only To Licensees Licensed Within That Local Jurisdiction.

Having discussed that the term "commercial cannabis activity" was deliberately not used in the second prong of Section 26200(a)(1), and that the word "operation" was only used in its ordinary sense, both of which negate Plaintiffs' claims of plenary power to prohibit all "commercial cannabis activity" in their jurisdictions, including the delivery of cannabis goods, we turn now to a discussion of the words of the second prong that fundamentally limit the reach of a local jurisdiction's authority to prohibit conduct only to those businesses that are licensed within that local jurisdiction. They are the words "…licensed under this division within the local jurisdiction."

Amicus respectfully submits that these words should be understood to mean what they say in their ordinary sense and that, in accordance with fundamental rules of statutory construction, they are not merely surplusage or placed in the subsection just to state the obvious, i.e., that Section 26200(a)(1), as does Section 26200 as a whole, relates to matters of a local nature. Rather, *amicus* submits that the term was used, and placed where it was placed, in order to provide that a local jurisdiction's authority to prohibit the actions of a cannabis business extends only to those businesses that are located and licensed within that jurisdiction. Said differently, given the words and their placement, i.e., immediately following the reference to businesses "licensed" under the division, the intent is that a local jurisdiction does not have the authority to prohibit the activities of licensees located in and licensed within other local jurisdictions.

As the California Supreme Court has instructed, "Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage." *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal. 4th 1106, 1117–18, citing *Reno v. Baird* (1998) 18 Cal.4th 640, 658. Therefore, the phrase "within the local jurisdiction" is presumed to have an intended meaning and purpose. By its own terms, and even its title, Section 26200 clearly relates to matters occurring within or pertaining to a local jurisdiction. Because of that, it would not have been necessary to add the phrase "within the local jurisdiction" if its purpose was to simply inform the reader that the subsection relates to local matters. To illustrate the point by comparison, subsections (a)(2) and (b) of Section 26200 also necessarily relate to local issues but, as may be seen, neither of them includes the term "within the local jurisdiction."

Recalling the Supreme Court's guidance relative to the interpretation of an initiative statute, a court must "first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole." (*People v. Superior Court (Pearson)* (2010) 48 Cal. 4th 564, 571.) It is clear, therefore, that "context" is important and *amicus* respectfully submits that it is indeed significant to this analysis here.

Specifically, with regard to context and placement of the qualifying phrase "within the local jurisdiction" in Section 26200(a)(1), while the phrase could have been placed either immediately after the word "prohibit", or the phrase "the establishment or operation," it was not. Had such alternative placement been used, the second prong would have effectively described the geographic locale in which a local jurisdiction's prohibitory authority could be exercised, but the qualifying phrase would not have thereby implicated the word "licensed." For example, the two options would have read in pertinent part, as follows:

Option 1:

> 26200. (a)(1) …, or to completely prohibit ***within the local jurisdiction*** the establishment or operation of one or more types of businesses ***licensed*** under this division.

Option 2:

> 26200. (a)(1) …, or to completely prohibit the establishment or operation ***within the local jurisdiction*** of one or more types of businesses ***licensed*** under this division.

But neither of those options were selected. Instead, the qualifying phrase was placed immediately after the words "licensed under this division." As such, the actual placement was as follows:

Actual placement:

> 26200. (a)(1) …, or to completely prohibit the establishment or operation of one or more types of businesses ***licensed*** under this division ***within the local jurisdiction***.

This is significant for at least three reasons. First, although the first prong does include the phrase "licensed under this division," it does not also include the qualifying phrase "within the local jurisdiction." Second, when addressing a local jurisdiction's authority to prohibit in the second prong, the words "licensed within this division" are immediately followed by the qualifying phrase "within the local jurisdiction," thereby ending the second prong with words whose ordinary meaning indicate an intent to limit a local jurisdiction's prohibitory authority only to those businesses that are licensed within that local jurisdiction.

Third, were the last antecedent rule of statutory interpretation to be applied, which provides that "'qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote…' ", that would again confirm, just as the plain meaning and actual placement of the words do, that the qualifying phrase "within the local jurisdiction" is appropriately to be applied to the phrase immediately preceding it, namely, "licensed under this division." (See *White v. County of Sacramento* (1982) 31 Cal.3d 676, 680, and *Lockhart v. United States* (2016) 136 S. Ct. 958, 962–63.) Either way, the language of Section 26200(a)(1) makes clear that a local jurisdiction's authority to prohibit conduct, under the second prong of Section 26200(a)(1), only extends to businesses that are licensed within that local jurisdiction and not to businesses that are not.

For the reasons noted above, not only does Section 26200(a)(1) not empower a local jurisdiction to prohibit delivery of cannabis goods within its borders, but whatever prohibitory power that is afforded by Section 26200(a)(1) only extends to those businesses that are actually licensed

within its jurisdiction. Accordingly, and as the discussion regarding Section 26090(e) in Part C of this brief underscores, Section 26200(a)(1) does not grant a local jurisdiction the authority to prohibit delivery of cannabis goods being made by a retailer that is not licensed within that local jurisdiction but is licensed and acting in compliance with the local law of a different local jurisdiction where its premises are located and licensed.

C. Section 26090(e) Does Not Grant Local Jurisdictions The Authority To Prevent Deliveries. On The Contrary, It Expressly Prevents Them From Doing So.

Section 26090(e) provides that so long as the delivery of cannabis goods are being made by a licensee (a retailer) acting in compliance with both state cannabis law under Division 10 and "local law as adopted under Section 26200", then a local jurisdiction "shall not prevent" that delivery from taking place. Specifically, Section 26090(e) provides:

> 26090. (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.

According to Plaintiffs, the reference to "local law" in Section 26090(e) is necessarily a reference to the local law of the local jurisdiction seeking to prevent delivery (meaning Plaintiffs) and is, therefore, a confirmation of the grant of authority to prohibit that Plaintiffs contend Section 26200(a)(1) affords them. Once again, Plaintiffs are wrong and they are wrong for three independent reasons.

First, as discussed in detail above, Section 26200(a)(1) does not by its terms grant a local jurisdiction the authority to prohibit the delivery of cannabis goods. It could have, had the term "commercial cannabis activity" or the word "delivery" been used, but they were not.

Second, whatever prohibitory authority Section 26200(a)(1) does grant to a local jurisdiction, that authority extends only to those businesses that are licensed within that local jurisdiction. That, *amicus* submits, is the plain meaning of the words "licensed under this division within the local jurisdiction," as they were used and approved in the second prong of Section 26200(a)(1).

Third, in their reading of Section 26090(e), Plaintiffs make a leap, born of an assumption, and reach an erroneous conclusion. Specifically, Plaintiffs assume that the reference to "local law"

in Section 26090(e) is necessarily a reference to "their" local law, or to the local law of a like-minded local jurisdiction that seeks to prohibit the sale and delivery of cannabis goods to its residents. But there is nothing in Section 26090(e) to support either that assumption or conclusion and both are undermined by the initiative itself.

As originally passed and adopted, Prop. 64 contained provisions recognizing that licensees (such as retailers) would have premises from which their business operations would be conducted. For example, when Prop. 64 was adopted, its Section 26055(c) imposed a license requirement "for each of the premises of any licensee having more than one location…":

> 26055. (c) Separate licenses shall be issued for each of the premises of any licensee having more than one location, except as otherwise authorized by law or regulation.

In addition, original section 26055 also included subsection (d), which imposed modification restrictions on licensees concerning their business locations and, by its terms, fully acknowledged and anticipated that licensees would be conducting their business operations from a physical location and premises:

> 26055. (d) After issuance or transfer of a license, ***no licensee shall change or alter the premises*** in a manner which materially or substantively alters the premises, the usage of the premises, ***or the mode or character of business operation conducted from the premises***, from the plan contained in the diagram on file with the application, unless and until prior written assent of the licensing authority or bureau has been obtained. For purposes of this section, material or substantial physical changes of the premises, or in the usage of the premises, shall include, but not be limited to, a substantial increase or decrease in the total area of the licensed premises previously diagrammed, or any other physical modification resulting in substantial change in the mode or character of the business operation.

(Section 26055(d), Prop. 64, prior to amendment by S.B. 94, *emphasis added*.)

The recognition, and indeed the requirement, that a cannabis "retailer" have a physical location, and that that location be a licensed premises from which its cannabis activities are to be

conducted, was further expressed under S.B. 94 in Section 26070(a)(1), which provides in relevant part as follows:

> 26070. (a) State licenses to be issued by the bureau related to the sale and distribution of cannabis and cannabis products are as follows:
>
> (1) "Retailer," for the retail sale and delivery of cannabis or cannabis pto customers. ***A retailer shall have a licensed premises which is a physical location from which commercial cannabis activities are conducted.*** A retailer's premises may be closed to the public. A retailer may conduct sales exclusively by delivery.

(Section 26070(a)(1), S.B. 94, *emphasis added*.)

Thus, from the time Prop. 64 was passed in 2016, through the adoption of S.B. 94 in 2017, it was always understood that a licensee, such as a retailer, would be conducting its business operations from a physical location. It was also understood that such a licensee/retailer would be subject to the local law of the jurisdiction(s) in which the premises from which the licensee/retailer conducted its operation was physically located and licensed.

Section 26090(e)'s reference to "local law as adopted under Section 26200" is, therefore, merely an acknowledgement that a licensed retailer, making a delivery of cannabis goods, must not only be licensed by and in compliance with state law ("compliance with this division") but must also be licensed by and in compliance with the local law of the jurisdiction where the retailer's licensed premises are physically located. (Sections 26055(c) and (d) – Prop. 64, and 26070(a)(1) – S.B. 94.)

Given the above, there is absolutely no basis for Plaintiffs' oft-stated assertion that when Section 26090(e) refers to a licensee acting in compliance with "local law as adopted under Section 26200" that the "local law" being referred to is that of the Plaintiffs, or other local jurisdictions who seek to prevent the delivery of cannabis goods to persons within their borders. On the contrary, it is clear that the "local law" referred to is the local law of the local jurisdiction where the subject licensee (retailer) who is making the delivery has its licensed premises and physical location from which its cannabis operation is being conducted.

Under Section 26090(e), therefore, so long as the licensed retailer making deliveries of cannabis goods is in compliance with state law (Division 10 and all associated rules and regulations), ***and*** the local law of the local jurisdiction where the retailer's required licensed business premises are physically located, local jurisdictions such as Plaintiffs are expressly barred from interfering with those deliveries. When the initiative is read as a whole, and the physical location requirements of licensees and especially retailers are known and understood, the meaning and intent of Section 26090(e) could not be more clear.

VI. SUMMARY

Voter intent and the extent of a local jurisdiction's authority to prohibit cannabis business activity under Section 26200(a)(1), along with the meaning and intent of Section 26090(e), are best discerned from the words of the two statutes themselves, taken as a whole and in the context of the initiative (Prop. 64 and S.B. 94). Considering the words used and not used, in the context and the statutes and initiative taken as a whole, and with guidance from time-honored rules of statutory construction, the following is clear:

Section 26200(a)(1) does not authorize a local jurisdiction to prohibit the delivery of cannabis goods to persons within its borders or otherwise. Nor does it grant a local jurisdiction the authority to prohibit the conduct of a cannabis business that is not licensed within that local jurisdiction. And, by its clear terms, Section 26090(e) prevents a local jurisdiction from preventing the delivery of cannabis goods being delivered by a licensed retailer acting in compliance with state law and the local law of the local jurisdiction where that retailer's physical business premises are located and licensed

Because local jurisdictions do not, in fact, have the authority to prohibit or interfere with the delivery of cannabis goods in their jurisdictions by retailers based outside of their jurisdictions, acting in compliance with state law and their own jurisdiction's local law, Regulation 5416(d), authorizing the delivery of cannabis goods to any jurisdiction in California, is not inconsistent with either Sections 26200(a)(1) or 26090(e). As such, the regulation was lawfully adopted by the Bureau and its enforcement should not be enjoined.

VII. CONCLUSION

Based upon the foregoing, *amicus*, HK Cannabis Law, respectfully submits that Plaintiffs' claims are without merit and the declaratory and injunctive relief requested should be denied in full.

Dated: August 3, 2020

Respectfully submitted,

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By _____

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PROOF OF SERVICE

I am employed in the County of Placer, State of California. I am over the age of 18 and not a party to the within action. My business address is 3001 Lava Ridge Court, Suite 300, Roseville, CA 95661.

On August 7, 2020, I served the within document(s) described as:

[PROPOSED] AMICUS CURIAE BRIEF

on the interested parties in this action as stated on the attached mailing list.

☒ (BY E-MAIL) By transmitting a true copy of the foregoing document(s) to the e-mail addresses set forth on the attached mailing list.

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

Executed on August 7, 2020, at Roseville, California.

Ashley Jackson
(Type or print name)

(Signature)

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