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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

COUNTY OF SANTA CRUZ, ET AL.,

Plaintiffs,

v.

BUREAU OF CANNABIS CONTROL, ET AL.,

Defendants.

Case No.: 19CECG01224

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

COMPLAINT FILED: April 4, 2019
TRIAL DATE: August 6, 2020
DEPARTMENT: 403

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I. INTRODUCTION

In their opening trial brief ("Tr.Br."), Plaintiffs established this case as one of statutory interpretation, with Business and Professions Code Section 26200 and Section 26090 compelling the conclusion that BCC's Regulation 5416(d) is void.[1] Defendant Bureau of Cannabis Control's ("BCC") opposing trial brief ("Opp.") merely confirms why judgment must be entered for Plaintiffs. Indeed, BCC's mischaracterization of the statutory scheme and failure to address Plaintiffs' arguments in a straightforward way powerfully demonstrates the correctness of Plaintiffs' position.

BCC, for example, implicitly concedes that it cannot operate within the plain language of the controlling statutes. BCC repeatedly "amends" Section 26200, subdivision (a), by changing words and deleting phrases sub silentio in advancing its position. It entirely ignores Section 26001, subdivision (k), which places delivery within local regulatory reach, and distorts straightforward Section 26090 beyond recognition.

There is similarly no room under the law to "defer" to BCC's view as it relates to BCC's objective of preempting local regulatory authority. California Supreme Court authority holds that courts should exercise independent judgment in construing statutes and should not defer to an agency's erroneous statutory construction. Through Regulation 5416(d), BCC asserts that it has authority to "supersede and limit" local control. Yet, Section 26200, subdivision (a), expressly provides that Proposition 64 shall not be construed to "supersede or limit" local control. The conflict is irreconcilable, and BCC's overreach exposed.

In an attempt to justify its rejection of what the voters adopted and its simultaneous power grab from local jurisdictions, BCC also offers a kitchen sink's worth of policy arguments, none of which are relevant given the plain language of the statutory scheme. For example, BCC rails against the potential problems caused by the patchwork of local regulations and frets over the potential impacts on the growth of cannabis

[1] References herein to "Regulation" are to Title 16, California Code of Regulations. References to "Section" are to the Business and Professions Code.

business and access to cannabis to buyers statewide. Whether BCC is right or wrong, however, is completely irrelevant to the issue before this Court. The statutory "bargain" was negotiated before BCC showed up on the scene. Proposition 64 promised the voters local control. The voters approved the legalization of recreational cannabis based on that guarantee of *continued* local control and local accountability. The voters did not approve entrusting cannabis regulation solely to distant state-level bureaucracies.

Given the lack of a viable substantive response to Plaintiffs' arguments, it is perhaps not surprising that BCC also tosses up a ripeness defense on the purported grounds that there is no active "case or controversy." This defense not only lacks merit, it borders on disingenuous given that BCC *already sued one of the Plaintiffs over the interpretation of Regulation 5416(d)*. Furthermore, Government Code section 11340 expressly authorizes the specific form of action brought by Plaintiffs, when a regulation is inconsistent with the governing statute. Moreover, Code of Civil Procedure section 1060 exists to enable courts to rule on controversies "relating to the legal rights and duties of the respective parties." (Code Civ. Proc., § 1060.) Plaintiffs contend that the very *existence* of Regulation 5416(d) threatens Plaintiffs' guaranteed authority. Declaratory relief exists for precisely these circumstances.

Legalization of adult-use recreational cannabis was—and remains—an evolving and controversial issue. Federal law still criminalizes many cannabis-related activities. Proposition 64/MAUCRSA represents bold change, but voters were expressly assured in making this change, by provisions in the initiative itself and in the accompanying ballot materials, that they would still have a voice, *locally*, about cannabis business establishment and operation. Voters maintained a safety valve, including the right to prohibit cannabis businesses altogether, to allow for local control and accountability. BCC has no authority to unilaterally countermand the voters, and no authority to strip localities of their Section 26200, subdivision (a), protected regulatory authority.

Plaintiffs respectfully request judgment be entered in their favor.

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II. DISCUSSION

A. BCC's Opposition Confirms It Acted In An Arbitrary And Capricious Manner To Strip Localities Of Their Expressly Reserved Power To Regulate Local Cannabis Business Activities.

1. BCC Is Not Entitled To Deference: Section 26200(a) Deprives BCC Of Any Possible Delegated Authority To "Legislate" Preemption Of Local Control, And Any BCC Technical Expertise Is Irrelevant.

Plaintiffs discussed the applicable standard of review at pages 23 to 26 of their Trial Brief. Plaintiffs established that while an agency regulation carries a presumption of validity, that presumption is not controlling when, as here, the challenge implicates statutory interpretation. (Tr.Br., 23, citing *Association of California Ins. Companies v. Jones* (2017) 2 Cal.5th 376, 389-90 ("*ACIC*").) Plaintiffs set forth the authority confirming that since the validity of Section 5416(d) turns solely on statutory interpretation, the determination is "a question of law" on which the court will exercise "independent judgment." (Tr.Br., 24.)

Ignoring the bulk of that authority, BCC contends that Regulation 5416(d) is somehow subject to only "limited judicial review" because of the broad rulemaking power provided by the Legislature to BCC to adopt implementing regulations. BCC also suggests its claimed technical expertise must be respected. BCC's request that this Court defer to its flawed statutory interpretation, however, falls short on multiple levels.

First, neither Proposition 64 nor the California Legislature through MAUCRSA delegated to BCC the power to legislate concerning the scope of local regulatory power. To the contrary, BCC was *denied* that authority by Section 26200, subdivision (a). (*See, e.g.*, Bus. & Prof. Code, § 26200, subd. (a)(1) ["This division shall not be interpreted to supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances. . . ."].) BCC's power arises from *within* this statutory framework, and it cannot use "deference" to bootstrap into regulatory authority that it does not have. (*See* Tr.Br., Section V.A.1, 23-25 [discussing scope of BCC's regulatory authority].)

Second, BCC's claimed technical expertise does not bear on any relevant issue. The question before the Court is a purely legal issue of statutory interpretation

concerning whether the voters in passing Proposition 64 enacted a two-tier regulatory scheme, whereby localities had co-equal power within their borders. There are no policy measures to be balanced or facts to be determined in construing Section 26200 and Section 26090. BCC can offer no "technical expertise" to evaluate whether the controlling law permits (or bars) preemption of local government regulation.[2] Indeed, given that the issue is one of a voter initiative's allocation of power as *between* levels of government, BCC's effort to expand its own administrative authority at the expense of local governments should be viewed skeptically, rather than with deference.

BCC's purported "care" in promulgating Regulation 5416(d) also does not weigh in favor of deference. During the rulemaking process, BCC repeatedly misquoted Section 26090 in responding to comments by excising Section 26090's incorporation of Section 26200's protection of local authority. (Tr.Br, Section IV.D, 18-22.) Misstating the law is not "care"; it is a demonstration of an arbitrary and capricious act.

Regulations that alter or amend the enabling statute, or impair its scope, are invalid. (*ACIC, supra*, 2 Cal.5th at p. 390; *see also Bonnell v. Medical Board* (2003) 31 Cal.4th 1255, 1265 [no deference owed to an interpretation that is "clearly erroneous."].) BCC had no authority to enact regulations outside of its delegated scope of authority or contrary to the enabling and controlling statute. Yet that is precisely what it did.

2. BCC Rewrites Section 26200 And Section 26090 In A Misguided Effort To Amass Regulatory Authority It Does Not Have.

BCC rewrites both Sections 26200 and 26090 to meet its power consolidation objective. Below, Plaintiffs unwind BCC's twisted construction of these provisions.

Section 26200

As Section 26200 drives the result in this case, it merits re-quotation before examining BCC's contentions:

[2] Regulation 5416(d) is also obviously interpretative, not "quasi-legislative," given that it implicates issues of preemption as controlled by Section 26200 and Section 26090. (*See ACIC*, 2 Cal. 5th at p. 396.) The label attached is in any event irrelevant, given the plain conflict between Regulation 5416(d) and controlling law.

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

(§ 26200, subd. (a)(1), bold added.)

Section 26200 offers local jurisdictions sweeping protection against state-level regulatory encroachment. Notably, this proscription against preemption is not qualified, as the first words of the provision demonstrate: "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, … ." (§ 26200, subd. (a)(1).) Where Plaintiffs have inserted an ellipsis, the words "*including, but not limited to* … ." follow. (*Ibid.*) Following those words are examples of local regulatory authority (zoning, land use, and the right to completely prohibit the establishment or operation of cannabis businesses), not constraints on local government authority. These examples establish that complete prohibition at the local level is fully consistent with the statutory scheme and purpose. These examples also merely illustrate the broad proscription against using Proposition 64 to encroach on local authority, they do not limit that local authority.

BCC never confronts this plain statutory language. Instead, BCC somehow interprets it to provide BCC with the authority to "supersede or limit the authority of a local jurisdiction." In so doing, BCC turns Section 26200 completely upside down.

This irreconcilable conflict between the statute and Regulation 5416(d) forces BCC (without disclosure of what it is doing) to "amend" Section 26200 in an effort to curtail the scope of the statute's local protection. BCC first ignores the unqualified nature of the anti-preemption language. Next, it argues that local jurisdictions may only "completely prohibit" cannabis businesses that have a "physical presence" within the jurisdiction. (Opp., 21:26-22:2.) *But nothing in Section 26200 says that.* BCC is working from a different statute than the one approved by the voters.

BCC does not stop there. BCC also changes the "or" in Section 26200, subdivision (a)(1), into an "and." (*See* Opp., 21:17-19 ("[t]he Bureau interpreted [Section 26200, subd. (a)(1)] to mean that local governments can regulate and even ban any commercial cannabis businesses, including retail delivery businesses, that are established **and** operate within its borders." [bold added]); (*see also* Opp., 21:19-21; 24:3-7 [also misquoting the statute]). Thus, under BCC's *amended* statutory language "establishment or operation" becomes "establishment and operation," with establishment in the jurisdiction suddenly being a controlling limitation on a local jurisdiction's prohibitory power.

Through these *de facto* amendments, BCC then asserts preemptive authority over localities. But it is working from a statute that does not exist. BCC has substantively changed the statute to improperly tilt the balance of regulatory authority in its favor. Section 26200, as written, is not qualified and says "or" not "and," such that local governments can regulate "operation" within their borders as much as "establishment."[3]

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). (*See also City of Vallejo v. NCORP4, Inc.* (2017) 15 Cal.App.5th 1078, 1081-82.)

Section 26090

BCC builds on its improper amendment of Section 26200, subdivision (a)(1), to distort the meaning of Section 26090. As the premise for its activism, BCC suggests that the relationship between Sections 26200 and 26090 required "clarifying," and that the

[3] As noted in Plaintiffs' Trial Brief, Section 26001, subdivision (k), provides that cannabis delivery constitutes commercial cannabis business activity. (*See* Tr.Br., 28, citing § 26001, subd. (k) [" 'Commercial cannabis activity' includes the cultivation, possession, manufacture, distribution, … , transportation, **delivery**, or sale of cannabis …" bold added].) BCC's Opposition conspicuously avoids citation of this provision. Yet Sections 26200, subdivision (a)(1), and 26001, subdivision (k), alone support judgment for Plaintiffs, even before addressing Section 26090.

two statutes need to be "reconciled." (Opp., 21:11-13; 24:3-4.) BCC also terms Plaintiffs' plain language construction "bizarre." (Opp., 22:21-22.)

Unfortunately for BCC, there is nothing ambiguous, confusing, or bizarre about Section 26090, or how Sections 26090 and 26200 work together. For reference, Section 26090, subdivision (e), provides as follows:

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

(§ 26090, bold added.)

Subdivision (e) does not present a complicated turn of phrase. Section 26090 does not read, "[a] local jurisdiction shall not prevent delivery of cannabis or cannabis products on public roads by a licensee." Nor does Section 26090 read, "[a] local jurisdiction shall not prevent delivery of cannabis or cannabis products on public roads by a licensee acting in compliance with this division." To the contrary, Section 26090 also includes an express reference to local laws as adopted under Section 26200.

Accordingly, taking the whole provision into account, a local jurisdiction shall not prevent delivery of cannabis where the delivery is being done by (1) a licensee, and where that licensee is *also* acting in compliance with (2) MAUCRSA *and* (3) local law as adopted under Section 26200. Quite obviously then, a locality can prevent delivery where a licensee is not acting in compliance with "local law as adopted under Section 26200." (§ 26090, subd. (e).) Since a "local law as adopted under Section 26200" can "completely prohibit" all cannabis business operations altogether within local borders, Section 26200, subdivision (a)(1), and Section 26090 confirm that local governments maintain full power to regulate or ban commercial cannabis deliveries locally. (*See also* Tr.Br., 33.)

Moreover, Plaintiffs' construction does not render any portion of Section 26090 surplusage or conflict with statutory intent. As explained in Plaintiffs' Trial Brief, a local jurisdiction's authority under Section 26200 extends to its borders, such that one locality cannot interfere with the operation of cannabis businesses in *other* jurisdictions, by, for

example, preventing a delivery destined for another jurisdiction by intercepting it on local public roads. (Tr.Br., SectionV.B.3, 31-33.)[4] In addition, where a locality does not enact an ordinance pursuant to Section 26200 governing delivery, then delivery is by default permissible within that locality. The default condition is permissive, not prohibitory, contributing to the growth of cannabis businesses, *except* where a local government has made the deliberate decision to act pursuant to its reserved Section 26200 authority. (*See also* Section II.B, *infra* [discussing former Bus. & Prof. Code, § 19340].)

There is nothing difficult, confusing, or contradictory about the interplay between Section 26090 and 26200. And that their plain meaning stands in the way of BCC's power grab is not a valid reason to sustain Regulation 5416(d).

BCC's "Bizarre" Construction

Plaintiffs have offered a comprehensive, internally consistent interpretation of Sections 26200 and 26090 that adheres to the plain language and that accommodates all surrounding statutory provisions. BCC in contrast ignores the plain language of Section 26200 and its sweeping provision for ongoing local control. It changes an "Or" into an "And" in Section 26200, subdivision (a)(1), in an effort to further improperly constrain local power. Then it effectively re-writes Section 26090 altogether.

BCC's arbitrary and capricious construction finds its fullest expression on this last point. BCC consistently excised Section 26090's reference to "local law as adopted under Section 26200" during rulemaking. (Tr.Br., Section IV.D, 18-22.) It knows, however, that it must offer something to the Court on this phrase. Thus, it contends that so long as the cannabis business is licensed by BCC and at least *one* local jurisdiction somewhere, then that cannabis business can deliver statewide to *any* local jurisdiction under Regulation 5416(d), even if such deliveries would otherwise violate local law in the destination jurisdiction. (Opp., 21, 24.) The local decision of that *one* community

[4] Plaintiffs offered a harmonious construction of both Section 26080 and Section 26090, demonstrating that together they ensure unhindered transportation and delivery of cannabis to all localities where such activities are allowed. (Tr.Br., 31-33.)

drives statewide delivery policy, and that one local jurisdiction also has effective veto power over the regulations of every other local jurisdiction with respect to delivery.

Now that is a bizarre construction. There is *nothing* in Section 26200, Section 26090, or the legislative history to suggest that the statutes give one *unspecified* local jurisdiction the right to mandate policy statewide. Such a construction leaves localities at the whim of a potentially far distant neighbor, which may face entirely different community issues and challenges. If that was the aim, Section 26200, subdivision (a)(1)'s, protections for local control would not have been included at all, in favor of affording BCC complete statewide preemptive power. That, of course, is not what happened. Rather, each locality kept the power to act locally.[5]

3. BCC's Flawed Interpretation Ignores Multiple Unambiguous Provisions Confirming The Equal Dignity Of Local Law Under The Two-Tiered Regulatory System Established By Proposition 64.

Plaintiffs in their Trial Brief conducted a comprehensive review of Proposition 64 and MAUCRSA to demonstrate the consistency of Plaintiffs' construction of Section 26200 and Section 26090 within the overall statutory scheme.

For example, Plaintiffs reviewed Section 26200, subdivision (a)(2), which confirmed that MAUCRSA cannot be interpreted to supersede or limit "existing local authority for law enforcement activity, enforcement of local zoning requirements or local ordinances, **or enforcement of local license, permit, or other authorization requirements**." (Bold added, *see* Tr.Br., 29:1-5.) Similarly, Plaintiffs identified Section 26200, subdivision (f), which confirmed that MAUCRSA "shall not be deemed to limit the authority or remedies of a city, county, or city and county under any provision of law, including, but not limited to, Section 7 of Article XI of the California Constitution." (*Id.*, lines 7-12.) Plaintiffs also discussed how the statutory scheme established two-tiers of regulatory authority and demonstrated that not only did BCC not have preemptive power

[5] *See* Trial Brief, 39:20-25 & n.26, citing *City of Riverside v. Inland Empire Patients Hlth. & Wellness Ctr. Inc.* (2013) 56 Cal.4th 729, 756 ("*Riverside*") ("[u]nder these circumstances, we cannot lightly assume the voters or the Legislature intended to impose a 'one size fits all' policy, … .").

in view of Section 26200, subdivision (a)(1), but BCC also had to recognize violations of local law in assessing BCC's *own* licensing decisions. (Tr.Br., 29:13-30:18.)

BCC's results-oriented reasoning ignores this. While judgment should be entered for Plaintiffs based on the plain language of Sections 26200, subdivision (a)(1), and 26090, these further inconsistencies between the law and BCC's proffered construction reinforce that fact. (*See* Tr.Br., Sections V.A.1, at 23-25, V.B.1 to V.B.3, 26-34.)

4. **BCC Seeks This Court's Endorsement Of A Blatant Bait And Switch Targeting California Voters.**

Plaintiffs in discussing the proper interpretation of Sections 26200 and 26090 reviewed the legislative history of Proposition 64. (Tr.Br., Section V.B.4, 35-48.) Plaintiffs highlighted the multiple instances where voters were told that local control would remain. Plaintiffs cited to the "Findings and Declarations," which stated that Proposition 64 "safeguards local control, allowing local governments to regulate marijuana-related activities, to subject marijuana businesses to zoning and permitting requirements, and to ban marijuana businesses by a vote of the people within a locality." (Tr.Br., 35:14-25, citing Prop. 64, § 2, subd. (E) [RJN, Ex. 45].) Similarly, Plaintiffs reviewed Proposition 64, Section 3, which declared that the express intent of Proposition 64 included allowing local governments to "enact additional local requirements for nonmedical marijuana businesses" and to "ban nonmedical marijuana businesses … ." (Tr.Br., 35:27-36:7, citing Prop. 64, § 3, subds. (c), (d) [RJN, Ex. 45].)

Moreover, the ballot materials provided to the voters in the Voter Information Guide expressly discussed the very issue under consideration by this Court:

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

(Legislative Analyst's Analysis of Proposition 64, Voter Information Guide [RJN, Ex. 46, at p. 93], bold added; *see* Tr.Br., 37.)

Notably, the construction offered by Plaintiffs is wholly consistent not only with the

plain text of the statutes but also this legislative history. Equally notable, defendant BCC ignores this legislative history altogether in support of BCC's aim of imposing a statewide uniform policy. (Opp., 27.) Local control was sold to the voters as part of the very bargain associated with their legalizing retail cannabis business. Through Regulation 5416(d), BCC engages in a classic bait and switch.

5. Acceptance Of BCC's Statutory Revisions Would Violate Constitutional Protections Limiting Unauthorized Amendment Of Voter Initiatives

Plaintiffs in Section V.C of their Trial Brief exposed the constitutional dimension of BCC's overreach. Proposition 64 is a voter initiative. As such, the voters retained the constitutional power to dictate how it might be amended in the future, and in the case of Proposition 64, they imposed strict constraints. (Tr.Br., 41:8-20, citing *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1046 fn. 10; Cal. Const., art. II, § 10, subd. (c).) Proposition 64 requires a two-thirds vote of the Legislature for most amendments, and even there, any proposed change must further the purpose and intent of the act. (Tr.Br., 42:9-15, citing Prop. 64, § 10 [RJN, Ex. 45].)

As discussed in the Trial Brief, Proposition 64 includes sweeping protection for local regulatory authority, including over deliveries, as an express purpose and intent. (*See, e.g.,* Bus. & Prof. Code, §§ 26001, subd. (k), 26200, subd. (a)(1), and 26090.) Regulation 5416(d) strips localities of that protected authority. It necessarily constitutes an unconstitutional (and ultra vires) effort at amendment.[6]

This Court has a "duty to jealously guard the people's initiative power" such that "the right to resort to the initiative process be not improperly annulled by a legislative body." (Tr.Br., 41:20-42:5, citing *People v. Kelly* (2010) 47 Cal.4th 1008, 1025; *see also*

[6]This is precisely why the Legislature dropped Senate Bill 1302 (2017-2018 Reg. Sess.), which sought the same improper end as Regulation 5416(d). (*See* Tr.Br., Section IV.C, 17-18.) Contrary to BCC's suggestion, because of the close parallel (and timing) between the derailed legislation and BCC's regulation, this Court may properly consider SB 1302 in addressing whether BCC has acted beyond its authority. (*See* Tr.Br., p. 18 fn.10.)

Ross v. Raging Wire Telecommunications, Inc. (2008) 42 Cal.4th 920, 930 ("[f]or a court to construe an initiative statute to have substantial unintended consequences strengthens neither the initiative power nor the democratic process; the initiative power is strongest when courts give effect to the voters' formally expressed intent, without speculating about how they might have felt concerning subjects on which they were not asked to vote.").) If BCC wants to remove local control over deliveries, then it needs voter approval to do so, either at the local level or through another initiative. Any effort by BCC to do so absent voter approval violates Section 26200 and the constitutional protections afforded to voter-initiative approved measures. (*Ibid.*)

B. <u>BCC's Reference To Former Business and Professions Code Section 19340 Amounts To A Concession On The Merits: Section 19340 And Section 26090 Use Different Words To Say The Same Thing.</u>

BCC cites to former Business and Professions Code section 19340 in support of its contention that Section 26090 does not authorize local regulatory authority over deliveries. This former section, entitled "Deliveries" (as is Section 26090), provided as follows:

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

(Opp., 27:12-22, citing former § 19340.)

BCC's reference to this former provision constitutes a striking admission on the validity of Plaintiffs' position. While BCC posits a "sharp contrast" between former Section 19340 and current Section 26090, in fact the two provisions say much the same

thing. According to BCC, former Section 19340 "prohibited local jurisdictions from banning 'carriage' of medical cannabis on public roads, [and] it permitted deliveries only in jurisdictions not explicitly prohibiting such deliveries." (Opp., 27:9-11.) As noted earlier, that is *precisely* what the current Section 26090 does as well, in a less wordy fashion. If anything, Section 26090, through its incorporation of the expansive Section 26200, provides localities with *more* regulatory flexibility than they had previously.

Thus, BCC's construction of Section 19340 as permitting local delivery regulation amounts to a direct concession on the correctness of Plaintiffs' construction. Section 19340 provided that "Deliveries … can only be made **by a dispensary** and in a city, county, or city and county **that does not explicitly prohibit it by local ordinance**." (Bold added.) Similarly, Section 26090 provides that "Deliveries … may only be made by a licensed retailer," and "[a] local jurisdiction shall not prevent delivery of cannabis or cannabis products on public roads **by a licensee** acting **in compliance with** . . . **local law as adopted under Section 26200**." (§ 26090, subds. (a) and (e), bold added.) "Dispensary" is swapped out for "licensee," while the default condition of permissive delivery *unless* a local government affirmatively acts to ban delivery remains. Under the former provision, a local government needs to enact a local ordinance to "explicitly prohibit" delivery; under the new law, a local government must "adopt a local law under Section 26200" in order to do so. That Section 26090 is pithier than former Section 19340 does not change that they both confirm local authority to ban local deliveries. BCC has made Plaintiffs' point.

C. BCC's Reliance On Health And Safety Code Section 11362.1 To Create A "Right" To Purchase Cannabis Statewide That Overrides Local Regulatory Authority Misconstrues Section 11362.1, Section 26200, Section 26090, And California Supreme Court Authority.

Citing to Health and Safety Code section 11362.1, BCC argues that there is a *right* to purchase cannabis in every local jurisdiction statewide, and that right would be "totally obstructed if local jurisdictions could impede statewide commercial activity." (*See* Opp., 11, 12, 26-27.) BCC then suggests that Regulation 5416(d) was "necessary

not only to vindicate the expressly protected right of access, … ." (Opp., 3:11-13.)

As a starting point, of course, nowhere in Plaintiffs' Trial Brief will the Court find Plaintiffs contending that Sections 26090 or 26200 give any one locality the ability to "impede statewide commercial activity." Instead, what Plaintiffs have said is that Sections 26090 and 26200 give localities rights *within* their jurisdictional borders, and that those rights are expressly protected from state-level interference.

Next, this argument is striking in what it reveals about BCC's arbitrary and capricious approach: BCC has taken unto itself the right to amend Section 26200 and Section 26090 to meet this asserted policy goal of statewide access. BCC has no such authority to change the law. (*See* Tr.Br., Sections V.A.1 [standard of review]; V.B.1 [BCC's delegated authority]; V.C [limits on Prop. 64 amendment]).

Third, Health and Safety Code section 11362.1 de-criminalizes certain cannabis activities. De-criminalizing an activity does not create an affirmative duty to facilitate that same activity. Relatedly, Section 26200, subdivision (a), and Section 26090 both ensure local governments can "completely prohibit" the establishment or operation of cannabis business within local borders, including as to local deliveries. That a different provision in the same legislative package de-criminalizes an activity does not mean that these other provisions are somehow stripped of their express meaning.

This is not a controversial point. The California Supreme Court in *Riverside, supra*, 56 Cal.4th 729, already rejected the same argument advanced by BCC here. In *Riverside,* plaintiffs suggested that the removal of certain criminal and state-level nuisance statutes with respect to medical marijuana created a "right" of access and required preemption of all local efforts that might hinder that access. The California Supreme Court rejected these arguments, noting that it has "made clear that a state law does not 'authorize' activities, to the exclusion of local bans, simply by exempting those activities from otherwise applicable state prohibitions." (*Id.* at p. 758, citing *Nordyke v. King* (2002) 27 Cal.4th 875, 884.) Accordingly:

> [L]ocalities in California are left free to accommodate such conduct, *if they choose*, free of state interference. As we have explained, however, the [Medical Marijuana Program's] limited provisions *neither expressly nor impliedly restrict or preempt the authority of individual local jurisdictions to choose otherwise for local reasons*, and *to prohibit collective or cooperative medical marijuana activities within their own borders*.

(*Riverside, supra,* 56 Cal.4th at p. 762, emphasis added; *see also ibid.* [removal of state-level criminal and civil sanctions for specified medical marijuana activities did not grant a "right" of "convenient access"]; *id.* at p. 753 [holding that prior act grants only "immunity from prosecution under specified state criminal and nuisance laws," and did not create any "broad right to use medical marijuana without hindrance or inconvenience." (citation omitted)]; *see also People ex rel Feuer v. Nestdrop, LLC* (2016) 245 Cal.App.4th 664, 668.)[7]

This reasoning attaches with equal force here. While the purchase of small amounts of cannabis no longer violates state *criminal* law, nothing in MAUCRSA mandates that localities facilitate purchases within their local borders. (*See* Section 26200, subd. (a); *see also City of Vallejo, supra,* 15 Cal.App.5th at p. 1081 [applying *Riverside*'s reasoning to Proposition 64 and citing Section 26200, subdivision (a)(1), holding that "Proposition 64 expressly provides that state regulations 'do not limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate' marijuana dispensaries 'or to completely prohibit' their 'establishment or operation.' "].)

D. <u>Only By Ignoring The Controlling Statues Can BCC Contend That Regulation 5416(d) Is Reasonably Necessary To Effect Proposition 64.</u>

BCC argues that "Plaintiffs do not allege anywhere in their complaint or opening brief that [Regulation 5416(d)] is not necessary to effectuate the purpose of Proposition 64 and Section 26090 and thus presumably agree that the regulation is necessary to advance the purpose and intent of the statute." (Opp., 28:15-19.) To be frank, Plaintiffs

[7] The California Supreme Court also held that nothing in the medical marijuana law "explicitly guarantees the availability of locations where such activities may occur, … ." (*Riverside, supra,* 56 Cal.4th at p. 753.) Similarly, the Court found that nothing *required* a locality to accept the presence of medical marijuana cooperatives or collective cultivation and distribution. (*Id.* at p. 755.)

are simply lost as to BCC's good faith basis for this assertion. Plaintiffs' Trial Brief addressed in exhaustive detail—from the plain language, to the surrounding statutory scheme, to the legislative history—exactly how Regulation 5416(d) cannot possibly advance the purposes and intent of the statutes *because it violates them*.

BCC ignores Section V.A.1, wherein Plaintiffs summarized the multiple ways in which Regulation 5416(d) violates the expressly stated "purpose and intent" of MAUCRSA and Prop. 64, "which include full and enduring protection of local authority." And Section V.B.1, where Plaintiffs explained the limits on BCC's regulatory authority in view of the purposes and intent of the law. And Sections V.B.2, V.B.3, and V.B.4, where Plaintiffs explored at length the multiple ways in which Regulation 5416(d) violates the law, particularly in view of Sections 26200, subdivision (a)(2), and 26090. And Section V.C, wherein Plaintiffs established that Regulation 5416(d) was contrary to the purposes of Proposition 64 and constituted an impermissible amendment of it. And Section V.D, wherein Plaintiffs requested an injunction because Regulation 5416(d) does not effectuate the purposes of Prop. 64 and MAUCRSA.

BCC also asserts that since certain commenters expressed a desire for a uniform statewide regulation of deliveries, Regulation 5416(d) must necessarily serve the purposes of the statute. (Opp., 28:24-29:14.) Again, BCC has confused its own unilateral policy objectives with the controlling law. Commenters are free to express whatever opinions they want – but that is not an excuse for BCC in promulgating the Regulation to disregard the plain and express requirements of Section 26200, subdivision (a)(2), and Section 26090. Those two provisions protect local control over deliveries, and no external comment can alter that fact. The only way to obtain uniform statewide control and regulation, free from local influence, is to amend Proposition 64. That is a task reserved to the voters.

E. <u>BCC Ignores Controlling Statutes In Favor Of Advancing Policy Judgments.</u>

BCC advances a series of arguments purporting to establish that Plaintiffs have not met their burden of proof of showing the invalidity of Regulation 5416(d). (Opp.,

Sections IV.A and IV.B.) Strikingly, in not *one* of these arguments does BCC cite to or recognize the controlling import of Sections 26200, subdivision (a)(1), or Section 26090 with respect to the claimed policy benefits of statewide preemption.

BCC's unilateral policy aims cannot countermand the plain language of the statute. For example, BCC argues that local total ban on delivery by licensees would be "preempted and void" as contradicted by state law. (Opp., 32:5-12.) In these sections, however, BCC cites to no provision mandating that localities allow the establishment or operation of cannabis business within their borders, or to any provision barring localities from enacting an ordinance under Section 26200, subdivision (a)(1), or Section 26090 to completely prohibit deliveries. Instead, BCC never once mentions either Sections 26200, subdivision (a)(1), or 26090 in this analysis—even though these two provisions directly and expressly protect local regulatory authority from state-level encroachment.

Similarly, BCC argues in Section IV.B that "retail delivery" is not an area traditionally subject to local control.[8] BCC then reviews the relative merits and demerits that local control might have on statewide commerce, with reference to items such as pharmaceutical prescriptions, wine, and products from Amazon. (Opp., 32-34.) BCC contends that if local jurisdictions "throughout the State could totally outlaw commercial transactions," then illicit market sales would occur, the "right of access guaranteed by the voters would be undermined, and the objective of creating a statewide commercial marketplace would be sabotaged." (Opp., 34:12-17.)

Notably missing *again* here, however, is a citation to Section 26200, subdivision (a)(1), or Section 26090. BCC may or may not be identifying legitimate public policy issues with respect to cannabis businesses, including with respect to challenges arising from a patchwork of local requirements. Even so, BCC has no authority to countermand the voters. BCC's policy aims cannot overrule the statutes.

[8] Retail cannabis delivery has been illegal under state and federal law until just recently. Federal law still criminalizes such activities. BCC consciously ignores the context within which Proposition 64 was approved by the voters.

For these same reasons, BCC's reliance on *Great Western Shows Inc. v. County of L.A.* (2002) 27 Cal.4th 853, 868, is misplaced. *Great Western* has no application here, where the governing statutory scheme includes an anti-preemption provision that preserves the right of a locality to ban the activity. (*See* § 26200, subd. (a)(1).)[9]

In ruling in this case, this Court will be guided by the controlling statutes. Under those statutes, the voters enacted a framework whereby local control remained, including the right to completely prohibit cannabis business establishment or operation. Thus, if the citizens of Inyo or San Bernardino (Opp., 26:9-16) are troubled by the approach of *their* local governments, their solution lies with those local governments and not with BCC. (*See* § 26200, subd. (a)(2)). Local governments are accountable locally, and it is up to the voters, locally (or through another initiative that amends Proposition 64) to alter any delivery restrictions now in place. The deal proponents of Proposition 64 struck with the voters was one that ensured local control. That bargain manifestly did not delegate plenary authority to a distant state bureaucracy.

F. BCC Incorrectly Contends That Plaintiffs Have Not Mounted A Successful Facial Challenge.

BCC suggests Plaintiffs have not mounted a sufficient facial challenge to Regulation 5416(d):

> The burden is on the Plaintiffs to overcome the presumptive validity of the Delivery Regulation. … In order to overcome this presumption, Plaintiffs must demonstrate that there are no circumstances under which the delivery regulation could be valid. … Even though this is the fundamental requirement for prevailing in a facial challenge to a

[9]As in other areas, the California Supreme Court in *Riverside* already rejected the same argument made by BCC here. In validating varied local regulation, the Supreme Court held "the premise of *Great Western*" to be inapplicable in the medical marijuana context, where the "sole effect of the [medical cannabis law's provisions] is to exempt specified medical marijuana activities from enumerated state criminal and nuisance statutes," and those "provisions do not *mandate* that local jurisdictions permit such activities." (*Riverside, supra,* 56 Cal.4th at pp. 760-761.) The same is true here. Pursuant to Section 26200, subdivision (a), local jurisdictions do not have to permit any commercial cannabis activity. (*See also Riverside, supra,* 56 Cal.4th at p. 744 ("[i]n addition, [w]e have been particularly 'reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another.' "), citations omitted.)

> regulation, Plaintiffs have not expressly made this allegation. **In their complaint and brief, the only thing that Plaintiffs have done is offer up an alternative construction of section 26090, subdivision (e).** As shown above, Plaintiffs' interpretation is both internally contradictory and relies exclusively on a narrow reading of one subdivision (section 26200, subdivision (a)), while ignoring all other features of Proposition 64 and MAUCRSA.

(Opp., at 35 (bold added, citations omitted).)

Rephrasing BCC slightly, the only thing that Plaintiffs have shown is that BCC's regulation *violates the law*. Not *once* in its Opposition Brief does BCC suggest that Regulation 5416(d) can stand *if* Plaintiffs' "alternative" view prevails. As described in Plaintiffs' Trial Brief, "[a] valid regulation must 'fit within the scope of authority conferred" by the Legislature. (Tr.Br., 25 fn. 15, citing *ACIC*, *supra*, 2 Cal.5th at p. 390, and the Administrative Procedure Act, Gov. Code, § 11342.1.) "[N]o regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (Gov. Code, § 11342.2.) Plaintiffs have demonstrated that BCC exceeded its statutory authority in promulgating Regulation 5416(d); that Regulation 5416(d) conflicts with the controlling statutes; and that Regulation 5416(d) cannot as a matter of law be reasonably necessary to effectuate the purpose of the statutes because it conflicts with them. (*See* Gov. Code, §§ 11342.1, 11342.2, 11349.) This showing more than suffices to meet Plaintiffs' burden.

G. <u>There Is No Ripeness Issue: Through Regulation 5416(d), BCC Has Already Stripped Local Governments Of Their Protected Regulatory Authority.</u>

BCC contends that Plaintiffs' challenge to Regulation 5416(d) is not ripe because there is no still-pending lawsuit seeking to strike down one of Plaintiffs' local regulations under Regulation 5416(d). BCC also suggests that the conflict between Regulation 5416(d) and Plaintiffs' ordinances is somehow merely hypothetical. It then goes through a tortured exercise sorting the various Plaintiff ordinances depending on how aggressively they regulate cannabis deliveries.

BCC over-complicates a straightforward issue. The validity of a specific Plaintiff's ordinance has not been placed at issue in this case. Section 26200 and Section 26090 affirmatively preserve local government regulatory authority over local cannabis

deliveries. Regulation 5416(d) strips localities of that power. That is the regulation's express and intended purpose per BCC itself. Regulation 5416(d) is the harm, and the difference in view as between Plaintiffs and BCC as to its validity the actual controversy concerning the rights and duties of the parties under the law. (Code Civ. Proc., § 1060.)

Little more need be said on this common-sense point, but Plaintiffs will nonetheless respond in more detail because of the length of BCC's submission on this meritless point.

First, beyond the plain language of Section 1060, Government Code Section 11350 expressly authorizes interested parties such as Plaintiffs to seek a declaration that agency regulations violate the law. (Gov. Code, § 11350, subd. (a).)

Next, there is nothing hypothetical or speculative about this controversy, and nothing merely advisory about this Court's adjudication of it. Plaintiffs claim to have equal authority under the law to regulate or even ban deliveries within their jurisdictions; BCC contends, on the other hand, that Regulation 5416(d) denies local jurisdictions that authority. Depriving localities of their statutorily preserved local control through 5416(d) *per se* damages California localities, *both* as to any present conflicting or inconsistent ordinance *and* as to any future ordinance, presently contemplated or not. The Regulation removes local regulatory power. That presents the controversy, and the Court should adjudicate it now to provide clarity to BCC, all local governments, and private parties and cannabis businesses.

BCC also incorrectly appears to suggest that Plaintiffs must wait for BCC or some other party to challenge their local ordinances under Regulation 5416(d) so that some sort of factual record can be developed in support of the challenge. This is not correct. Again, it is BCC's regulation not Plaintiffs' ordinances that are at issue. No factual record is required. Regulation 5416(d) either violates the law or it does not.[10]

[10] Plaintiffs also do not reach beyond the controlling statutes and rulemaking record in establishing the invalidity of BCC's regulation. Plaintiffs supplied their ordinances to further demonstrate that they are "interested parties." (Gov. Code, § 11350, subd. (a).) Each Plaintiff is a local jurisdiction with specific statutory authority granted to them by

As for BCC's sorting of the various Plaintiff ordinances into one of three groups, that is at once irrelevant and self-defeating. It is *irrelevant* because it is BCC's promulgation of the unlawful and preemptive Regulation 5416(d) that establishes the justiciable controversy. As noted, this Court has *not* been asked to adjudge the validity of each of Plaintiffs' various ordinances, or to compare and contrast those ordinances to Regulation 5416(d). (*See* Complaint, First Cause of Action, Prayer for Relief.)

And it is *self-defeating* as BCC's own "groupings" independently confirm the existence of a live dispute. The ordinances BCC places in "Group 3," for example, obviously present a justiciable controversy, as those ordinances ban adult-use, non-medicinal deliveries directly contrary to Regulation 5416(d) "any jurisdiction" mandate. (*See* Opp., 15:6-9.) BCC's Group 2 similarly establishes the existence of a present controversy. "Group 2" includes plaintiff County of Santa Cruz, which BCC states prohibits entities licensed only in other jurisdictions from delivering to their jurisdiction. (Opp., 15:1-5.) BCC's own construction admits to the conflict between Regulation 5416(d), which allows licensed entities to deliver to "any" jurisdiction, and Santa Cruz's prohibition on deliveries by outside companies.

Here, it is worth noting BCC's failure to mention its *own* litigation activities regarding Regulation 5416(d). BCC represents to the Court: "There has yet to be an actual controversy between any of the Plaintiffs and the Bureau over implementation or enforcement of the Delivery Regulation." (Opp., 37:4-5.) This is false. BCC already relied upon Regulation 5416(d) to try to invalidate Santa Cruz's ordinances in the prior *East of Eden v. County of Santa Cruz* ("*East of Eden*") litigation. (Tr.Br., 12:12-15, citing RJN, Ex. 39.) In addition, BCC, *in this very action*, sought to continue the trial date, citing to its own *East of Eden* Complaint-in-Intervention. (Decl. of Stacey Roberts

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Section 26200 with respect to the regulation of commercial cannabis activity, and each faces curtailment of that authority through Regulation 5416(d). None of this is as complicated as BCC would like to make it.

in Support of Defendants' Motion to Continue Trial, filed January 30, 2020, Ex. B.)[11]

BCC's Complaint-in-Intervention asserted that Santa Cruz's ordinances *violated* Regulation 5416(d) and therefore could *not* be enforced. (RJN, Ex. 40 at ¶¶ 1, 3, 22-23.) This historical record before a fellow Superior Court is properly subject to judicial notice. BCC cannot in good faith advance its ripeness defense in view of its prior Complaint-in-Intervention. Yet nowhere does BCC call out its prior intervention in the *East of Eden* lawsuit, discuss its Complaint-in-Intervention, or confront the implications thereof.

Finally, the Rulemaking Record itself demonstrates that an actual controversy is before the Court, as commenters repeatedly expressed that BCC's regulation impermissibly encroached on local authority. (Tr.Br., 18-22.)

Nor does any of the limited authority relied upon by BCC support its ripeness defense. BCC's primary authority, *Pacific Legal Foundation v. Cal. Coastal Comm.* (1982) 33 Cal.3d 158 ("*Pacific Legal*"), does not aid its cause. In *Pacific Legal*, the California Supreme Court declined to address a challenge to a Coastal Commission development guideline, where under the circumstances of that case, the parties were inviting the court "to speculate as to the type of developments for which access conditions might be imposed, and then to express an opinion on the validity and proper scope of such hypothetical exactions," and where it was "sheer guesswork to conclude that the Commission [would] abuse its authority by imposing impermissible conditions on any permits required." (*Id*., at pp. 172, 174.)

Here, in contrast, there is no speculation, hypothesizing, or guesswork afoot. The Court is being asked to assess whether Regulation 5416(d), which purports to preempt and strip localities of their statutorily protected regulatory authority, is lawful. Regulation 5416(d)'s preemption presents the controversy, the specificity, and the harm. For this same reason, this Court's ruling invalidating the regulation will offer specific,

[11] The original plaintiff in the *East of Eden* case was a cannabis business. The Superior Court denied its request for a preliminary injunction in view of Proposition 64's express protection for local control over deliveries. (*See* RJN, Ex. 38.) That this prior litigation happened also demonstrates the harm this regulatory uncertainty has created.

meaningful relief to Plaintiffs (and the wider industry) with respect to their local lawmaking authority. Plaintiffs' claims are therefore ripe and justiciable.[12]

III. CONCLUSION

Regulation 5416(d)'s preemption of local regulatory authority as guaranteed by Sections 26200, subdivision (a), and 26090 violates the law, has created regulatory uncertainty, and has directly harmed Plaintiffs through the infringement of their lawful regulatory powers.

Plaintiffs request that judgment be entered in their favor, that the Court declare that Regulation 5416(d) is void since it is inconsistent with the two controlling statutory provisions, as well as the overall statutory scheme, that BCC be enjoined from its enforcement, and that Plaintiffs be awarded reasonable attorneys' fees and costs under Code of Civil Procedure section 1021.5.

Dated: June 22, 2020

Respectfully submitted,
NOONAN LAW GROUP

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[12] *See also Communities for a Better Environment v. State Energy Resources Conservation and Development Commission* (2017) 19 Cal.App.5th 725, 735 (distinguishing *Pacific Legal* in a challenge to a statute that restricted judicial review of an agency's decisions, as "no factual context from an individual Energy Commission certification proceeding is necessary, or even useful, to resolution of the constitutional question raised. Moreover, the constitutional question will necessarily be implicated in every future judicial proceeding seeking review of an Energy Commission decision."); *id.* at pp. 734-39 (reviewing cases finding the ripeness element satisfied where direct challenges are raised to the legality of an enactment, including where, as here, delay in decision will result in "lingering uncertainty in the law"); *Qualified Patients Ass'n v. City of Anaheim* (2010) 187 Cal.App.4th 734, 756 (issue whether Medical Marijuana Program Act preempted local city ordinance was "an actual controversy between the parties relating to their respective legal rights and duties" and "stated a legally sufficient complaint for declaratory relief," which had to be addressed by the trial court in the first instance); *Environmental Protection Information Center v. Dep't of Forestry and Fire Protection* (1996) 43 Cal.App.4th 1011, 1019-20 (association deprived by regulation of right to comment on timber harvest plans was interested party entitled to challenge regulation).

County of Santa Cruz, et al. v. Bureau of Cannabis Control, et al.
Fresno County Superior Court Case No. 19CECG01224

DECLARATION OF SERVICE

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in this action. I am employed by Churchwell White LLP and my business address is 1414 K Street, 3rd Floor, Sacramento, CA 95814. On this day I caused to be served the following document(s):

Plaintiffs' Reply Trial Brief

☐ By United States Mail. I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses set forth below.

☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepared.

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☒ By electronically transmitting a true copy [by agreement of the parties] to the persons at the electronic mail addresses set forth below.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 22, 2020, at Sacramento, California.

/s/ Amanda Price Mendoza
AMANDA PRICE MENDOZA