CITY AND COUNTY OF SAN FRANCISCO

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MEMORANDUM

TO: Nicole Elliott
Director, Office of Cannabis

FROM: Matthew Lee ML
Deputy City Attorney

DATE: February 1, 2019

RE: Validity of State Administrative Rule Purporting to Preempt Local Regulation of Cannabis Deliveries

SUMMARY

When Californians voted to legalize recreational cannabis in 2016, they voted for a legislative scheme that—they were promised—preserved local jurisdictions' authority to regulate commercial cannabis activity. They did so when California courts had already made clear in the context of medical cannabis that local authority to regulate cannabis distribution was core to municipalities' police power, and not preempted by state law. Consistent with this historical backdrop, and with state voters' intent, the relevant statutory text preserves local jurisdictions' authority to prohibit or otherwise regulate the "operation" of any kind of cannabis business. Additional statutory text expressly extends this authority to cannabis deliveries. Like most other local jurisdictions in California, the City and County of San Francisco (the "City") has enacted legislation regulating cannabis deliveries.

Now, the State has approved an administrative rule that purports to preempt local jurisdictions' authority to regulate cannabis deliveries. The State's Bureau of Cannabis Control first proposed this rule after the State Legislature rejected essentially identical legislation—legislation that was, if anything, less intrusive on local authority than the Bureau's final rule. Because of the apparent conflict between this new rule and the City's ordinances regulating cannabis deliveries, you have asked us to assess the validity of the State's new rule.

For the reasons set forth in this memorandum, the State's administrative rule conflicts with the relevant state statutes. The State's rule contravenes the plain text of Business and Professions Code Section 26200, which preserves local authority to regulate the operation of all cannabis businesses—and the plain text of Business and Professions Code Section 26090, which makes clear that local authority under Section 26090 applies to cannabis deliveries. Even if there were any ambiguity in the statutory text (which there is not), the legislative history would eliminate any question. When Californians voted to legalize cannabis, they were promised in the measure and accompanying ballot materials that they were voting to preserve local control over commercial cannabis activity. And by November 2016—when Californians voted to preserve local control—it was clear that local jurisdictions could regulate the distribution of cannabis, including the distribution of cannabis via delivery. Faced with this history and text, the Legislature rejected a bill similar to the State's new administrative rule, treating that bill as an amendment to California's existing cannabis statutes.

MEMORANDUM

TO: Nicole Elliott
Director, Office of Cannabis
DATE: February 1, 2019
PAGE: 2
RE: Validity of State Administrative Rule Purporting to Preempt Local Regulation of Cannabis Deliveries

Because the State's new administrative rule conflicts with the relevant state statutes, that administrative rule is void. We will, if necessary, vigorously defend the City's authority to enforce its cannabis-delivery regulations.

BACKGROUND

In November 2016, California voters approved Proposition 64, the Adult Use of Marijuana Act (AUMA). As a matter of state law, AUMA legalized the personal possession and consumption, and limited personal cultivation, of recreational cannabis by adults aged 21 or older. (Prop. 64 (Nov. 2016), § 4, codified in relevant part at Health & Safety Code §§ 11362.1–11362.45.) AUMA also established a framework for regulating commercial cannabis activity related to recreational cannabis, under which such activity would be lawful only if conducted under approvals at both the state and local levels. (Prop. 64, § 6, codified in relevant part at Bus. & Prof. Code §§ 26000–26211.) Consistent with AUMA's provisions regarding amendment by the Legislature (Prop. 64, § 10), the Legislature later enacted the Medicinal and Adult Use Cannabis Regulation and Safety Act, which implemented this framework as to both medical and recreational cannabis. (Cal. Stat. 2017, ch. 27 (Sen. Bill No. 94 (2017–2018 Reg. Sess.)).)

Local control is a cornerstone of this statutory framework. From the beginning, AUMA made that clear that state law could not "be interpreted to supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate" cannabis businesses. (Prop. 64, § 6, codified in relevant part at Bus. & Prof. Code § 26200(a)(1).) This local regulatory authority extended as far as the power "to completely prohibit the establishment or operation of one or more types of [cannabis business] within the local jurisdiction." (*Id.*) Later legislative amendments to Section 26200 further underscored that state law did not "supersede or limit existing local authority" for, among other things, "enforcement of local zoning requirements or local ordinances, or enforcement of local license, permit, or other authorization requirements." (Cal. Stat. 2017, ch. 27 (Sen. Bill No. 94 (2017–2018 Reg. Sess.)), § 102, codified in relevant part at Bus. & Prof. Code § 26200(a)(2).)

This regulatory framework specifically applies to cannabis deliveries. The relevant provisions of AUMA defined "commercial marijuana activity" (today called "commercial cannabis activity") to include, among other things, the "delivery" of cannabis and cannabis products. (Prop. 64, § 6, codified in relevant part at Bus. & Prof. Code § 26001(k) (2019).) In case there were any doubt, AUMA provided that local jurisdictions would be obliged to allow cannabis deliveries only if those deliveries were performed "in compliance with . . . local law as adopted under Section 26200"—the section of the Business and Professions Code preserving local authority to regulate cannabis businesses' operations. (Prop. 64, § 6, codified in relevant part at Bus. & Prof. Code § 26090(e).)

Consistent with this statutory text, AUMA promised voters that its regulatory scheme "safeguards local control, allowing local governments to regulate marijuana-related activities." (Prop. 64, § 2(E).) The preservation of local control was also included in AUMA's statement of purpose and intent. (Prop. 64 § 3(c)–(d).) And, although the Legislative Analyst's official analysis of AUMA informed voters that local jurisdictions "could not ban the *transportation* of marijuana *through* their jurisdictions" (which AUMA addressed separately from delivery—in Business and Professions Code Section 26080, rather than Section 26090), voters were assured

that, otherwise, "cities and counties could regulate nonmedical marijuana businesses." (Analysis by the Legislative Analyst, Prop. 64 (Nov. 2016), p. 93 (emphasis added).) Likewise, voters were assured that "[l]ocal governments will continue to have the ability to regulate where and how medical marijuana businesses operate." (*Id.* at pp. 91–92.) The official argument in favor of Proposition 64, for its part, promised voters that "64 preserves local control." (Official Voter Information Guide (Nov. 2016), p. 99.)

In approving this system of local control, the voters did not write on a blank slate: by the time of AUMA's enactment, local jurisdictions already exercised sweeping authority to regulate cannabis activity. Courts interpreting California's pre-AUMA medical-cannabis statutes consistently upheld local ordinances restricting "the use of property to cooperatively or collectively cultivate and distribute medical marijuana." (*City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.* (2013) 56 Cal.4th 729, 753; *see also, e.g., Conejo Wellness Ctr., Inc. v. City of Agoura Hills* (2013) 214 Cal.App.4th 1534; *Cty. of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861; *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153.) These cases vindicated localities' "constitutional authority to regulate the particular manner and location in which a business may operate." (*Hill*, 192 Cal.App.4th at 869; *see* Cal. Const., art. XI, § 7.) By 2013, the City of Los Angeles had exercised that same authority as to cannabis deliveries, enacting an ordinance—subsequently enforced by the courts—prohibiting nearly all such deliveries. (L.A. Prop. D (2013), repealed by Ord. No. 184,841 (2017); *see People ex rel. Feuer v. Nestdrop, LLC* (2016) 245 Cal.App.4th 664.) The California Court of Appeal described this ordinance as "a municipal initiative on a wholly municipal matter." (*Safe Life Caregivers v. City of Los Angeles* (2016) 243 Cal.App.4th 1029, 1045.) Such was the extent of the local control over the cannabis industry that the voters "preserved" in November 2016.

Legislative amendments to AUMA must be consistent with the Act's "purposes and intent" (Prop. 64, § 10), and the Legislature has never amended AUMA to reduce the respect for local control enshrined in Business and Professions Code Section 26200. In 2018, the Legislature considered a bill that would have diminished local control: Senate Bill 1302, which required a two-thirds majority for passage, would have purported to prohibit local jurisdictions from adopting or enforcing "any ordinance that would prohibit a [state] licensee from delivering cannabis within or outside of the jurisdictional boundaries of that local jurisdiction." (Sen. Bill No. 1302 (2017–2018 Reg. Sess.), § 1.) But SB 1302 failed; it was ordered to the inactive file on May 31, 2018, where it subsequently died.

Approximately one month after the failure of SB 1302, the State's Bureau of Cannabis Control first proposed administrative action identical in substance to that failed legislation. Like SB 1302, the Bureau's proposed rule would have provided that cannabis businesses could deliver to "any jurisdiction within the State of California." (Bureau of Cannabis Control, Proposed Text of Regulations (July 2018), § 5416(d).) The proposed rule did not acknowledge Business and Professions Code Section 26200, and made no provision for local regulation of cannabis deliveries. This omission only grew more apparent over the course of the Bureau's rulemaking process: the Bureau's final rule, approved by the State's Office of Administrative Law on January 16, 2019, provides that cannabis businesses may "deliver to any jurisdiction within the State of California provided that such delivery is conducted in compliance with all delivery provisions of" the Bureau's own, state-level regulations. (Cal. Code Regs. tit. 16, § 5416(d)

MEMORANDUM

(2019).) On its face, the rule seems to say that, as long as a cannabis business complies with state-level delivery regulations, it need not also comply with any local jurisdiction's delivery regulations. In other words, the State's rule apparently purports to preempt local jurisdictions' authority to regulate cannabis deliveries.

Like most other local jurisdictions in California, the City has enacted legislation regulating cannabis deliveries. (S.F. Police Code § 1622.) This legislation subjects delivery operators to rules promoting public health, public safety, and corporate accountability. For example, delivery operators must store their cannabis in secure lock-boxes (*id.* § 1622(b)(9)); deliver it in child-resistant containers (*id.* § 1622(b)(8)); verify customers' ages and identities upon receipt, and confirm that each customer received the correct product (*id.* § 1622(b)(5–6)); keep detailed records of each delivery (*id.* § 1622(b)(10–11)); and ensure that deliveries are conducted by operators' own employees (*id.* § 1622(b)(1)). Additionally, deliveries must be conducted by businesses holding City permits, and within the City's geographic jurisdiction—helping to ensure that delivery operators are subject to effective local regulatory oversight of compliance with health and safety laws. (*Id.* § 1622(a).)

In light of the apparent conflict between the State's new administrative rule and the City's legislation, you have asked us to assess the validity of the State's new rule.

ANALYSIS

"[A]dministrative action must be within the scope of authority conferred by the enabling statute." (*Ass'n for Retarded Citizens v. Dep't of Developmental Servs.* (1985) 38 Cal.3d 384, 391 (1985) (in bank).) "Administrative action that is not authorized by, or is inconsistent with, acts of the Legislature is void." (*Id.*)

In analyzing whether administrative action is consistent with state statutes, courts look first to the statutory text. (*Marshall v. McMahon* (1993) 17 Cal.App.4th 1841, 1847–48.) Courts may then look to legislative history, as well as general policies underlying the legislation. (*Id.*) Here, the relevant statutory text reveals—and underlying legislative history and policy confirm—that the State's new administrative rule is inconsistent with state cannabis statutes, and is therefore void.

Even if the State's administrative rule were not void on its face, there would be strong arguments that it could not be applied against the City. Under the California Constitution, charter cities like San Francisco possess plenary authority to "make and enforce all ordinances and regulations in respect to municipal affairs." (Cal. Const., art. XI, § 5(a).) The California Court of Appeal has, in the context of California's pre-AUMA medical-cannabis regime, recognized that the regulation of cannabis within a city's borders is "a wholly municipal matter." (*Safe Life Caregivers v. City of Los Angeles* (2016) 243 Cal.App.4th 1029, 1045.) But because the State's rule is void on its face—that is, because the rule falls outside the scope of the relevant state statute—we need not further analyze whether that rule may be lawfully applied against charter cities. (*Cf. Cal. Fed. Sav. & Loan Ass'n v. City of Los Angeles* (1991) 54 Cal.3d 1, 16 ("[A] court asked to resolve a putative conflict between a state statute and a charter city measure initially must satisfy itself that the case presents an actual conflict between the two.").)

MEMORANDUM

TO: Nicole Elliott
Director, Office of Cannabis
DATE: February 1, 2019
PAGE: 5
RE: Validity of State Administrative Rule Purporting to Preempt Local Regulation of Cannabis Deliveries

I. The State's rule conflicts with the statutory text.

The State's new administrative rule is inconsistent with the text of state statutes concerning regulation of commercial cannabis activity.

A. The State's rule conflicts with Business and Professions Code Section 26200.

The State's new rule conflicts with a plain reading of the text of Business and Professions Code Section 26200.

Section 26200 preserves local control over all commercial cannabis activity. From the outset, Section 26200 provides that state cannabis laws "shall not be interpreted to supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate [cannabis] businesses." (Bus. & Prof. Code § 26200(a)(1) (2019).) Section 26200 contains no stated limit to this local regulatory authority: on the contrary, this local regulatory authority extends as far as the power "to completely prohibit" the operation of a cannabis business. (*Id.*) *A fortiori*, the power to prohibit the operation of a cannabis business includes the power to impose regulations on that operation of that cannabis business short of outright prohibition. (*Cf. McRae v. Pine*, 25 Cal.App. 594, 598 (1914) ("The power to prohibit [a liquor] business includes the power and right to regulate by the imposition of conditions and restrictions.").)

The next sentence of Section 26200 confirms the breadth of local regulatory authority over commercial cannabis activity. Under that provision, state law "shall not be interpreted to supersede or limit existing local authority" for, among other things, "enforcement of . . . local ordinances, or enforcement of local license, permit, or other authorization requirements." (Bus. & Prof. Code § 26200(a)(2).) And, under the California Constitution, this existing local authority is limited only by the extent of any conflict with state law: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7.) But Section 26200, by rebuffing any effort to "supersede or limit existing local authority," specifically declines to create any such conflict. Read against the backdrop of the California Constitution, Section 26200 contains no obvious limit to the general reservation of local authority.

It does not matter that Section 26200 enumerates some examples of permissible local regulation, without also enumerating others. First, some of those examples may in fact be all-encompassing: as just noted, Section 26200 preserves all "existing local authority," which expressly includes the authority to enforce "other authorization requirements." (Bus. & Prof. Code § 26200(a)(2).) And to the extent Section 26200 identifies specific categories of regulation ("local zoning and land use requirements, business license requirements, and requirements related to reducing exposure to secondhand smoke"), those categories are introduced with the phrase "including, but not limited to." (*Id.* § 26200(a)(1).) "[T]he proviso 'including, but not limited' connotes an illustrative listing, one purposefully capable of enlargement." (*People v. Arias* (2008) 45 Cal.4th 169, 181.)

Nor does it matter that cannabis deliveries, unlike other forms of commercial cannabis activity, require no permanent physical presence within a local jurisdiction. For one thing, as we discuss below, another provision of state law—Section 26090(e) of the Business and Professions Code—makes clear that Section 26200 applies equally to cannabis deliveries. Moreover, by its

own terms, Section 26200 contains no physical-presence requirement. On the contrary, Section 26200 speaks in terms not only of the "establishment" of a cannabis business, but also of a cannabis business's "operation." (Bus. & Prof. Code § 26200(a)(1).) When a cannabis business conducts deliveries, those deliveries are part of the "operation" of the business. (*Cf. id.* §§ 26038 (equating the "operation" of an unlawful cannabis business with unlicensed "commercial cannabis activity"), 26001(k) (defining "commercial cannabis activity" to include delivery).)

In sum, the plain text of Section 26200 preserves local authority to regulate commercial cannabis activity—including the authority to regulate cannabis deliveries. The State's new administrative rule conflicts with this express reservation of local authority. Because the State's administrative rule conflicts with the operative statute, it is void.

B. The State's rule conflicts with Business and Professions Code Section 26090.

By virtue of its inconsistency with Section 26200, the State's new rule also conflicts with the plain text of Business and Professions Code Section 26090. Under that statute, "[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." (Bus. & Prof. Code § 26090(e) (2017).) This language could hardly be clearer. Local jurisdictions may adopt laws to regulate cannabis deliveries, under Section 26200, in the same way they may adopt laws to regulate all other commercial cannabis activity. And local jurisdictions may prevent cannabis deliveries when those deliveries are not made in compliance with local law.

Given Section 26090(e)'s complete incorporation of Section 26200, one might ask what independent purpose is served by Section 26090(e). But, under the plain reading given above, Section 26090(e) has substantial independent work to do. For example, by cross-referencing Section 26200 in the specific context of deliveries, Section 26090(e) eliminates any potential ambiguity concerning whether Section 26200 applies to deliveries. And the remainder of Section 26090(e)—providing that "[a] local jurisdiction shall not prevent delivery of cannabis or cannabis products on public roads by a licensee" behaving lawfully—can do important work, as well, without negating Section 26090's incorporation of Section 26200. In particular, as we next explain, the remainder of Section 26090(e) can be read to prohibit local jurisdictions from intercepting cannabis deliveries *moving through*—but not terminating in—their boundaries, in the same way that an adjacent section of the Business and Professions Code prevents local jurisdictions from intercepting other cannabis shipments (bound for destinations other than consumers) moving through their communities.

To explain why this reading of Section 26090 makes sense, we first turn to Business and Professions Code Section 26080—the section immediately preceding Section 26090. Section 26080 provides, in relevant part, that "[a] local jurisdiction shall not prevent transportation of cannabis or cannabis products on public roads by a licensee." (Bus. & Prof. Code § 26080(b).) In other words, Section 26080 generally prohibits a local jurisdiction from obstructing cannabis shipments passing through that jurisdiction while in transit to destinations elsewhere.

But Section 26080 applies only to the "transportation" of cannabis—and therefore does not prohibit local jurisdictions from obstructing cannabis shipments when those shipments instead constitute cannabis "delivery." California's cannabis laws distinguish between the

MEMORANDUM

TO: Nicole Elliott
Director, Office of Cannabis
DATE: February 1, 2019
PAGE: 7
RE: Validity of State Administrative Rule Purporting to Preempt Local Regulation of Cannabis Deliveries

"transportation" and "delivery" of cannabis. (Bus. & Prof. Code § 26001(k).) "Delivery" refers to "the commercial transfer of cannabis or cannabis products *to a customer*"—that is, to a consumer. (*Id.* § 26001(p), (n).) "Transportation," presumably, refers to any other circumstance under which cannabis or cannabis products are moved. For example, consider the movement of cannabis from a cultivation site to a manufacturing facility, or from a manufacturing facility to a distribution facility, or from a distribution facility to a retail establishment: all of these scenarios would involve the "transportation" of cannabis, but none would involve cannabis "delivery." Conversely, the retail establishment's movement of the cannabis from its premises to a consumer's doorstep, would constitute cannabis "delivery."

In this light, Section 26080 and Section 26090 can be read, in tandem, to prohibit local jurisdictions from obstructing otherwise-lawful cannabis shipments on their way to other destinations. The key difference between Section 26080(b) and Section 26090(e) (which otherwise contain identical language on this point) is that Section 26090(e) applies to "delivery," and Section 26080(b) applies to "transportation"—that is, Section 26090(e) applies whenever a shipment of cannabis is bound for a consumer, and Section 26080(b) applies at all other times. So construed, Section 26090 requires a local jurisdiction to allow cannabis deliveries to *pass through* the jurisdiction en route to consumers elsewhere, but does not abrogate local jurisdictions' authority to regulate the delivery of cannabis to consumers within their own borders.

This reading of Sections 26080 and 26090 harmonizes both statutes, leaving each with independent work to do. (*Cf. Pac. Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 805 ("A court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them").) It also "give[s] force and effect to all of their provisions" (*id.*)—including the provision of Section 26090 completely incorporating Section 26200. And, in giving force and effect to Section 26090's incorporation of Section 26200, this reading confirms that Section 26090 means what it says: Section 26090 commands respect for, rather than the abrogation of, "local law as adopted under Section 26200." (Bus. & Prof. Code § 26090(e).)

II. The State's rule is inconsistent with legislative history and policy.

Even if the plain text of the state cannabis legislation were not clear (which it is), the history of the legislation, which reveals that legislation's policy, further confirms that the State's new administrative rule conflicts with California's cannabis statutes.

A. AUMA's legislative history confirms its policy in favor of local authority over all commercial cannabis activity.

AUMA's legislative history leaves no doubt that the preservation of local authority to regulate all commercial cannabis activity—including cannabis delivery—is one of AUMA's essential policies. When Californians voted for AUMA, they were repeatedly promised that they were voting to preserve such local authority.

These promises began with the preface to AUMA itself. In an uncodified section, AUMA promised to "safeguard[] local control" by "allowing local governments to regulate marijuana-related activities." (Prop. 64, § 2(E).) This promise was echoed by AUMA's

statement of purpose and intent, which stated the electorate's intent to allow localities to "enact additional local requirements for nonmedical marijuana businesses," or "to ban nonmedical marijuana businesses as set forth in this Act." (Prop. 64 § 3(c)–(d).)

These promises were reiterated and expanded upon in "the analyses and arguments contained in the official ballot pamphlet"—which are particularly helpful as "indicia of the voters' intent." (*People v. Birkett* (1999) 21 Cal.4th 226, 243.) The official argument in favor of Proposition 64 promised voters that "64 preserves local control." (Official Voter Information Guide (Nov. 2016), p. 99.) The Legislative Analyst's official analysis, likewise, promised voters that "[l]ocal governments will continue to have the ability to regulate where and how medical marijuana businesses operate," and that the same would be true of "nonmedical marijuana businesses." (Analysis by the Legislative Analyst, Prop. 64 (Nov. 2016), pp. 91, 93.)

These promises were framed in general, universal terms: they referred to "marijuana-related activities," "medical marijuana businesses," and "nonmedical marijuana businesses," without further distinguishing between different types of cannabis businesses or activities. None of these promises contained any special exception for cannabis delivery. The Legislative Analyst's analysis *did* make note of such exceptions, where they existed: in particular, the Legislative Analyst noted that (consistent with our own analysis of Sections 26080 and 26090, above), local jurisdictions "could not ban the *transportation* of marijuana *through* their jurisdictions." (*Id.* at p. 91 (emphasis added).) But the Legislative Analyst did not identify any such exception for delivery. On the contrary, the same paragraph of the Legislative Analyst's report assured voters that "cities and counties could regulate nonmedical marijuana businesses," without any further limitation or restriction. (*Id.*)

B. Pre-AUMA history confirms the breadth of local control preserved by current cannabis statutes.

The promise that AUMA "preserved" local control over commercial cannabis activity becomes even more important when put in context: at the time when AUMA was adopted, local jurisdictions had already successfully asserted their authority to regulate the distribution of cannabis—including the distribution of cannabis via delivery.

Before the enactment of AUMA, courts consistently rejected the argument that state law preempted local ordinances regulating cannabis distribution. "If there was ever any doubt about the Legislature's intention to allow local governments to regulate marijuana dispensaries"—which the California Court of Appeal did "not believe there was"—it had been completely eliminated by 2011. (*Cty. of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 868.) And, although the facts of these cases (which predate enormous growth and innovation in California's legal cannabis industry) tended to involve traditional physical premises, rather than deliveries, their language swept more broadly. For example, the California Supreme Court spoke of local governments' authority to restrict "the use of property to cooperatively or collectively cultivate and distribute medical marijuana." (*City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.* (2013) 56 Cal.4th 729, 753.) The Court of Appeal, for its part, spoke of the authority to restrict the ability to "distribute, or otherwise obtain" medical cannabis. (*Conejo Wellness Center, Inc. v. City of Agoura Hills* (2013) 214 Cal.App.4th 1534, 1555.) This authority, while derived in part from local authority over land-use decisions, also derived from

localities' "constitutional authority to regulate" not only a business's physical location, but also "the particular *manner* . . . in which a business may *operate*." (*Hill*, 192 Cal.App.4th at 896 (emphasis added); *see* Cal. Const., art. XI, § 7.)

Consistent with these cases, in 2013, voters in the City of Los Angeles enacted an ordinance comprehensively regulating the distribution of medical cannabis—including the distribution of cannabis via delivery. (L.A. Prop. D (2013), repealed by Ord. No. 184,841 (2017).) Indeed, this ordinance completely "ban[ned], except in very limited circumstances, vehicle delivery of marijuana." (*People ex rel. Feuer v. Nestdrop, LLC* (2016) 245 Cal.App.4th 664, 675.) In 2016, the California Court of Appeal affirmed a preliminary injunction enforcing the ordinance against an app-based delivery-scheduling service—and, although the court did not reach the merits of a preemption argument, the court did not suggest any doubt about the ordinance's validity. (*Id.* at 678.) That same year, a different panel of the Court of Appeal described that same ordinance as "a municipal initiative on a wholly municipal matter." (*Safe Life Caregivers v. City of Los Angeles* (2016) 243 Cal.App.4th 1029, 1045.) By November 2016, local regulatory authority over the distribution of cannabis via delivery was established not only in theory, but in practice.

"Absent a clear indication of preemptive intent from the Legislature, [courts] presume that local regulation in an area over which [a] local government traditionally has exercised control is not preempted by state law." (*Action Apartment Ass'n., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1242.) Voters, for their part, "are presumed to have been aware of existing laws at the time [an] initiative was enacted." (*Prof'l Engineers in Cal. Gov't v. Kempton* (2007) 40 Cal.4th 1016, 1048.) By November 2016, when the voters enacted AUMA, it was clear that local governments exercised broad regulatory power over the organized distribution of cannabis—including, as in Los Angeles's case, the distribution of cannabis via delivery. California's cannabis laws contain no clear indication that they were meant to preempt such local regulation: on the contrary, as we have discussed, those laws specifically preserve existing local regulatory authority. Administrative action purporting to preempt local authority over cannabis deliveries is inconsistent with this legislative scheme.

C. This analysis is consistent with the post-AUMA history of SB 1302.

While not necessary to the analysis, the conclusion that the new rule is void is also consistent with the Legislature's treatment of SB 1302.

Generally the Legislature's failure enact a law has little weight, because, "[o]rdinarily, [courts] do not draw substantive conclusions based on legislative inaction." (*Miklosy v. Regents of Univ. of California* (2008) 44 Cal.4th 876, 897.) But there are "limited circumstances under which an unenacted bill is relevant." (*Cal. Chamber of Commerce v. State Air Res. Bd.* (2017) 10 Cal.App.5th 604, 630, *review denied* (June 28, 2017).) A court could conclude that such circumstances are present with respect to the Legislature's failure to enact SB 1302.

In particular, a court could conclude that the failure of SB 1302 reflects a situation in which "the Legislature has studied an issue . . . and thereafter decline[d] to change the law or adopt a new proposal." (*Id.*) The Senate Floor Analysis of SB 1302—which courts "may properly consider . . . in determining legislative intent" (*Jevne v. Superior Court* (2005) 35

Cal.4th 935, 948)—reveals serious doubt about whether SB 1302 was within the Legislature's power. After noting that AUMA "[g]rants local governments wide latitude to regulate commercial cannabis activity within their jurisdictions," the Senate Floor Analysis reported that "most local governments in the state" had restricted cannabis deliveries "[u]sing the authority granted by AUMA." (Sen. Rules Committee, Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 1302 (2017–2018 Reg. Sess.), pp. 2, 4.)

But if local delivery restrictions were—as the analysis agreed—an exercise of "the authority granted by AUMA," could the Legislature really abrogate that voter-derived authority? It could do so only if SB 1302 was consistent with AUMA's "purposes and intent" (Prop. 64, § 10)—and the Senate Floor Analysis emphasized that "[a] core goal of AUMA was to preserve local control over the cannabis businesses that operate within local jurisdictions." (Analysis of Sen. Bill No. 1302, p. 4.) Thus, the analysis warned, "the courts may decide if SB 1302 is consistent with Proposition 64." (*Id.* at p. 5.) In this light, the failure of SB 1302 (which was referred to the inactive file eight days after the Senate Floor Analysis was issued) may well reflect the Legislature's unwillingness to test the limits of its power in a way that risked conflict with the will of the electorate.

Moreover, the legislative history of SB 1302 reveals the Legislature's understanding that SB 1302 would, in fact, represent an *amendment* to AUMA. AUMA allows the Legislature to act by simple-majority vote to "implement" certain provisions, or to further reduce the penalties for cannabis-related offenses. (Prop. 64, § 10.) But as the Senate Floor Analysis noted, "[a]ny other amendments require a two-thirds vote." (Analysis of Sen. Bill No. 1302, p. 5.) "Because SB 1302's amendments to [AUMA] go beyond simply *implementing* AUMA," Legislative Counsel advised that SB 1302 required a two-thirds vote. (*Id.* (emphasis in original).) The Legislature appears to have retained this two-thirds majority requirement—which, again, reflected the understanding that SB 1302 was an "amendment" to AUMA—throughout SB 1302's history.

"Administrative regulations that alter or amend the statute . . . are void." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 16.) The legislative history of SB 1302 reveals the Legislature's understanding that SB 1302 would, in fact, have amended the relevant statute. And if SB 1302 would have amended the statute, an administrative regulation purporting to achieve the same result as SB 1302 would be void. In fact, however, the new administrative regulation discussed in this memorandum seems to sweep even more broadly than did SB 1302: whereas SB 1302 would arguably have prevented local jurisdictions only from *prohibiting* cannabis deliveries, the State's new rule appears to prevent local jurisdictions from regulating cannabis deliveries at all. The history of SB 1302, which the Legislature viewed as an amendment to AUMA, is thus consistent with the conclusion that the State's new rule is void.

CONCLUSION

For each of the foregoing reasons, the State's administrative rule purporting to preempt local regulation of cannabis deliveries conflicts with the relevant state statutes, and is therefore void. We are prepared to vigorously defend the City's authority to enforce the City's ordinances regulating cannabis deliveries.