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M E M O R A N D U M

To: REDACTED **Date:** May 28, 2018

From: Khurshid Khoja

Subject: Legal Analysis of Total Bans on All Retail Cannabis Deliveries by Local Jurisdictions

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I. Question Presented: Do local jurisdictions have the authority under state law to ban retail delivery of legal cannabis to private residences?

As currently drafted, the Medicinal and Adult Use Cannabis Regulation and Safety Act ("MAUCRSA") is silent on the *limits* of municipal police power that may be exercised by cities and counties in connection with their authority to "ban the establishment and operation" of licensed cannabis businesses under Section 26200 of the Business and Professions Code ("BPC"). While MAUCRSA affirms that local governments may continue to exercise their traditional police powers to choose which land uses to allow and which to prohibit, this silence has been interpreted by many local jurisdictions to expand the scope of those police powers—extending their land use authority past the front doors of private homes to prohibit the delivery of lawful consumer goods to their residents.

Certain local governments have acted on such interpretations by passing ordinances that not only (1) prevent cannabis delivery businesses from establishing a "licensed premises" within their borders, *but also* (2) unduly restrict the access of their residents to legal, regulated cannabis by prohibiting any licensed cannabis delivery services from delivering to private residences.

II. Brief Answer: No. Total Local Bans on Delivery of Retail Cannabis to Residents are Both Expressly Pre-Empted by State Law and Prohibited by the State Constitution.

As explained in the analysis below, only the first type of ordinance is actually consistent with the express intent of MAUCRSA; the second type of ordinance is not only inconsistent with the intent and purpose of MAUCRSA, but also in direct conflict with judicial precedents on the constitutional limits on local police power.

In passing such delivery bans, local jurisdictions are asserting that when it comes to cannabis MAUCRSA gives local governments the right to exercise police powers (i) in conflict with individual rights established by California voters, (ii) in a manner that is both arbitrary and discriminatory, (iii) in a way that redefines traditional residential uses to abrogate fundamental constitutional rights, and (iv) without any reasonable relationship to a legitimate governmental purpose, or even a reasonable tendency to promote the public health, morals, safety, or general welfare of the community.

SB 1302 would address this problem by explicitly limiting the exercise of local police powers. Specifically, the bill would add a new subsection (h) to BPC Sec. 26200, which would prohibit local jurisdictions from banning deliveries to their residents by licensed cannabis retailers (with a principle place of business outside of their jurisdiction): "(h) A local jurisdiction shall not adopt or enforce any ordinance that would prohibit a licensee from delivering cannabis within or outside of the jurisdictional boundaries of that local jurisdiction." In so doing, SB 1302 would conform the exercise of local police power with state statutes and established judicial precedent, while still allowing local governments to reasonably regulate the operation of licensed cannabis retail delivery businesses that deliver to its residents.

III. Summary and Analysis of Applicable State Law: The Medicinal and Adult Use Cannabis Regulation and Safety Act (MAUCRSA) Balances Protection of Individual Rights with Preservation of Local Land Use Authority; MAUCRSA Did Not Expand Police Powers to Support Total Local Bans, Which Are Expressly Pre-Empted and Unconstitutional as a Matter of Law.

A. With Few Exceptions, MAUCRSA Explicitly Pre-Empts All Other State and Local Laws That Prohibit Adults and Qualified Patients over 21 from Purchasing and Obtaining Legal Cannabis.

The text of Prop 64 and Prop 215, as currently set forth in statute by MAUCRSA and the Compassionate Use Act, grants qualified patients and adults over 21 the legal right to purchase and obtain cannabis. Prop 64 even grants these rights *notwithstanding state and local laws to the contrary*, and applies equally to all adults over 21 *including* qualified patients. More importantly, California voters established these individual rights through the democratic process. These rights are explicitly set forth in Cal. Health and Safety Code ("HSC") Sections 11362.1 and 11362.5. Prop. 64 reads in relevant part:

> (a) Subject to Sections 11362.2, 11362.3, 11362.4, and 11362.45, *but notwithstanding any other provision of law*, it shall be lawful under state *and local law*, *and shall not be a violation of state or local law*, for persons 21 years of age or older to:

> (1) *Possess*, process, transport, *purchase, obtain,* or give away to persons 21 years of age or older without any compensation whatsoever, not more than 28.5 grams of cannabis not in the form of concentrated cannabis; [and]
>
> (2) *Possess*, process, transport, *purchase, obtain*, or give away to persons 21 years of age or older without any compensation whatsoever, not more than eight grams of cannabis in the form of concentrated cannabis, including as contained in cannabis products; …

HSC Section 11362.1 (italics and underlining added for emphasis).

The plain meaning of the foregoing language conflicts with and pre-empts any local bans and other provisions of state law (including other parts of MAUCRSA, such as BPC Sections 26090 and 26200) that are cited by local governments to support complete bans on retail cannabis delivery. To the extent the voters and legislators intended to make the individual rights granted under HSC Sec. 11362.1 *subject* to BPC Sections 26090 and 26200, they would have expressed that intent through the explicit language of HSC Sec. 11362.1(a). However, HSC Sec. 11362.1(a) expresses no such intent—it simply reads: "*[s]ubject to Sections 11362.2, 11362.3, 11362.4, and 11362.45, but notwithstanding any other provision of law*," including BPC Sections 26090 and 26200, "it shall be lawful under state and local law, and shall not be a violation of state or local law, for persons 21 years of age or older to" purchase and obtain cannabis.

Additionally, the relevant portion of Prop. 215 reads as follows:

> (1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:
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> (A) To ensure that seriously ill Californians have *the right to obtain and use marijuana for medical purposes* where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief….
>
> (C) To encourage the federal and *state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients* in medical need of marijuana.

HSC Section 11362.5(b) (italics and underlining added for emphasis). As discussed further below, Prop 64 significantly expanded the scope of the patient's right to obtain medicine originally enshrined under Prop 215, at least with respect to qualified patients aged 21 and over.

B. MAUCRSA Explicitly Limits Local Land Use Authority with Regard to Home Cultivation, Prohibiting Regulation of Activity Inside Private Residences, and Extends that Prohibition to Purchases Inside Private Residences.

MAUCRSA imposes *new statutory limits* on the authority exercised by local governments to limit cannabis cultivation. While state judicial precedents *prior to Prop 64* consistently upheld the exercise of local land use authority to completely ban the cultivation of medical cannabis by residents, the holdings in those precedents stand for the limited proposition that a patient's "right to obtain" medical cannabis under Prop 215 does not trump a local government's ability to prohibit certain land uses, specifically the cultivation of cannabis. Prop 64 (and later MAUCRSA) invalidated those precedents as they relate to patients over 21 and replaces their holdings with express statutory rights to obtain and cultivate cannabis at home.

1. Prop 64 Prohibited Local Governments from Banning Cultivation Inside a Private Residence.

It's important to note that these pre-Prop 64 holdings *did not* specifically address the right of qualified patients to possess, purchase, or obtain finished medical cannabis goods via home delivery. The most recent precedent in this line of cases is *Kirby v County of Fresno* (2015) 242 Cal.App.4th 940.[1] The holding in *Kirby* says that Prop 215 did not create a right to cultivate MMJ that was *beyond the reach of land-use authority.*[2]

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[1] "In *Kirby*, the court upheld a county ordinance banning medical marijuana dispensaries and banning the personal cultivation or storage of medical marijuana within the county. The court also upheld the component of the ordinance limiting use of medical marijuana to qualified patients at their personal residences only. In reaching these holdings, the court relied on *City of Riverside v Inland Empire Patients Health & Wellness Ctr., Inc.* (2013) 56 Cal.4th 729 and *Maral v City of Live Oak* (2013) 221 Cal.App.4th 975, and it also conducted an independent analysis of the text of the CUA and MMPA. The court found there is no right to cultivate medical marijuana and that municipalities may enact land use regulations restricting or banning cultivation. The court further concluded that a patient does not have a right to obtain or use medical marijuana but that the CUA and MMPA provide a defense to possession or use when a person is faced with arrest or criminal prosecution." *The California Municipal Law Handbook*, § 9.50A (published by Continuing Education for the Bar ("CEB").

[2] "[T]he declaration of purpose in section 11362.5, subdivision (b)(1)(A) does not establish an absolute right to obtain and use marijuana. The 'right' to obtain and use medical marijuana only allows specified persons to avoid punishment under sections 11357 (possession) and 11358 (cultivation). (§ 11362.5, subd. (d).) Consequently, we conclude the CUA does not create a right to cultivate medical marijuana that is beyond the reach of local land use regulations." *Kirby*, 242 Cal.App.4th at 965.

In addition to *Inland Empire, Maral,* and *Kirby,* the following opinions (circumscribing patient rights to obtain medical cannabis under Prop 215) have all been premised on local land use authority: "*County of Los Angeles v Hill* (2011) 192 Cal.App.4th 861 (rejecting claim that CUA and MMPA preempted a conditional use permit requirement and locational restrictions for medical marijuana dispensaries); *Browne v County of Tehama* (2013) 213 Cal.App.4th 704 (upholding rural county ordinance regulating marijuana cultivation); *County of Tulare v Nunes* (2013) 215 Cal.App.4th 1188 (upholding zoning ordinance that restricted location of medical marijuana collectives and cooperatives; ruling that limitations on

However, California voters enacted *new statutory limits* to the exercise of land use authority over cannabis cultivation via Prop 64. The initiative gave every adult over 21 the express right to cultivate six plants indoors in their home, expanding the scope of permissible home activities in a residential use zone and invalidating previous precedents (at least as they relate to qualified patients *over 21*). Prop. 64 (now MAUCRSA) reads as follows:

> (a) Subject to Sections 11362.2, 11362.3, 11362.4, and 11362.45, *but notwithstanding any other provision of law*, it shall be lawful under state *and local law*, *and shall not be a violation of state or local law*, for persons 21 years of age or older to: …
>
> (3) *Possess, plant, cultivate, harvest, dry, or process* not more than six living cannabis plants and possess the cannabis produced by the plants;…
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> (c) Cannabis and cannabis products involved in any way with conduct deemed lawful by this section are not contraband nor subject to seizure, *and no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest*.

HSC Section 11362.1 (italics and underlining added for emphasis).

> (1) A city, county, or city and county may enact and enforce reasonable regulations to regulate the actions and conduct in paragraph (3) of subdivision (a) of Section 11362.1.
>
> (2) Notwithstanding paragraph (1), *a city, county, or city and county shall not completely prohibit persons engaging in the actions and conduct under paragraph (3) of subdivision (a) of Section 11362.1 inside a private residence*, ….

HSC Section 11362.2(b) (italics and underlining added for emphasis).

2. The State has Authority to Define Residential Use, Preclude Local Land Use Authority, and has Historically Done So.

Note that there are other examples where state law has defined certain residential uses to be beyond the scope of local land authority, as it has clearly done in HSC Sec. 11362.2.[3] A small-family

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quantity of cultivation do not render ordinance unconstitutional in context other than criminal prosecution); *Conejo Wellness Ctr., Inc. v City of Agoura Hills* (2013) 214 Cal.App.4th 1534 (neither CUA nor MMPA preempted a local ban on medical marijuana dispensaries); and *City of Monterey v Carrnshimba* (2013) 215 Cal.App.4th 1068 (affirming summary judgment against medical marijuana dispensary and holding that a dispensary was not a listed use in city's planning ordinance and thus was presumptively banned; rejecting claim that a dispensary fell within preexisting land use classifications for personal services, retail sales, and pharmacies and medical supplies)." *The California Municipal Law Handbook*, § 9.50A.

[3] *See California Land Use Practice*, § 12.64 (published by Continuing Education for the Bar ("CEB").

day-care home is deemed a residential use of property under state law, and thus must be permitted anywhere residential uses are permitted.[4] This state law provision prevails over conflicting charter city ordinances.[5] Additionally, Section 51035 of the Government Code limits local governments from preventing the use of one's private residence to operate a cottage food business, explicitly defining such activity as a residential use.[6]

Likewise, HSC Sec. 11834.23(a) deems an "alcoholism or drug abuse recovery or treatment facility that serves six or fewer persons … a residential use of property," which arguably imposes as much neighborhood impact than the cultivation or retail delivery of cannabis to a private residence—perhaps even more so, as individuals battling dependence on illicit controlled substances may be at a higher risk for attracting completely unlawful commerce and the attendant public safety hazards into the neighborhood. Notwithstanding this potential impact, HSC Sec. 11834.23(e) prevents local governments from requiring any additional land use entitlements for operators of such facilities, or distinguishing them from any other permitted use in residential zones: "[n]o conditional use permit, zoning variance, or other zoning clearance shall be required of an alcoholism or drug abuse recovery or treatment facility that serves six or fewer persons that is not required of a single-family residence in the same zone." The same state law also protects fundamental constitutional rights (such as freedom of association) from local encroachment via land use authority: "the residents and operators of the facility shall be considered a family for the purposes of any law or zoning ordinance that relates to the residential use of property …."[7]

3. Purchasing and Obtaining Cannabis Inside a Private Residence is Protected by Prop 64, and is Incidental to Residential Use.

So, if a local jurisdiction can *no longer* completely prohibit adults and qualified patients over 21 from growing cannabis in a private residence on the basis of its land use authority, what basis does it have to prohibit home-delivery of legal cannabis to those same residents? The black letter law already recognizes that local land use authority does not extend past one's front door to apply to activities "inside a private residence." Additionally, the rights to purchase and obtain are established in the same statutory provision of MAUCRSA as the right to grow inside a private residence—HSC Section 11362.1. If adults and qualified patients can now cultivate cannabis inside their private

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[4] *See* HSC §1597.45(a).

[5] *See, e.g., City of Los Angeles v Department of Health* (1976) 63 Cal.App.3d 473 (addressing charter city zoning ordinances and family homes for handicapped).

[6] Govt. Code Section 51035(a) states, in relevant part: "A city, county, or city and county shall not prohibit a cottage food operation, as defined in Section 113758 of the Health and Safety Code, in any residential dwellings, but shall do one of the following: (1) Classify a cottage food operation as a permitted use of residential property for zoning purposes…."

[7] Note that all of the foregoing state protections from overreaching local land use authority are also extended to intermediate care facilities for the developmentally disabled and congregate living health facilities under state law. *See* HSC Sec. 1267.8.

residence without encroachment by local government, then it stands to reason that all legal cannabis activity occurring inside a private residence—including purchasing or obtaining cannabis inside one's home via a delivery service—is beyond the reach of local governments. Indeed, HSC Section 11362.1(c) expressly prohibits any local government search of a private residence for cannabis which is lawfully cultivated, purchased or obtained pursuant to HSC Section 11362.1 of Prop 64:

> (c) Cannabis and cannabis products involved in any way with conduct deemed lawful by this section are not contraband nor subject to seizure, *and no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest*.

This conclusion is also consistent with long-standing principles of land use authority as they relate to uses which are incidental to residential use. "Apart from those activities that are inconsistent with an exclusive residential zone, the residential use of property must be deemed to include the broad sphere of home activities as they existed at common law."[8] Simply put, it is not inconsistent with residential zoning for a private individual to receive home deliveries of lawful consumer goods, whether that resident is receiving a pizza from Dominoes, groceries fro Amazon, large home appliances from Sears, *or* legal cannabis from a licensed non-storefront retailer operating pursuant to MAUCRSA.

C. Local Jurisdictions May Not Prevent Delivery of Cannabis on Public Roads under MAUCRSA

BPC Section 26090 governs the delivery of cannabis by licensed non-storefront retailers. Specifically, Section 26090(e) provides that "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*."

1. The Plain Meaning of Sec. 26090(e) Provides that Local Governments May NOT Prohibit Home Deliveries to Residents

Note that, on its face, the application of this provision is *not* limited to retailers who transport cannabis goods *through* a banning jurisdiction, but rather applies to all deliveries "on public roads by a licensee." Though the statute doesn't explicitly also reference "private roads," that would be unnecessary for obvious reasons—it's a foregone conclusion that private individuals police their own private roads. Given that a licensee could *only* access private residences *from* public roads, *and* that local governments lack the authority to prohibit residents from inviting a licensed retailer onto their

[8] These "home activities" include far more than the sole use of a house and grounds for food and shelter; they extend to the use of a "home as a social institution, … for the private religious, educational, cultural and recreational advantages of the family." *See California Land Use Practice*, § 4.54, quoting *Thomas v Zoning Board of Adjustment* (Tex. Civ. App 1951) 241 S.W.2d 955, 958.

private roads, driveways, and walkways, the plain meaning of Section 26090(e) is to unambiguously permit retail cannabis deliveries to private residences. Such an interpretation would also be consistent with the state's express policy goal (set forth in Prop 215) of "implement[ing] a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need …."[9]

2. Sec. 26090(e) Provides that Local Governments May Reasonably Regulate, But Not Bar, Retail Licensees that Deliver to Private Residences

The language "in compliance with … local law as adopted under Section 26200," is cited by banning jurisdictions to assert that licensees who deliver to their residents (in spite of the ban) are not covered by the protections of Section 26090. However, this position assumes that local governments actually have the legal authority to pass local laws that prevent patients and other residents 21 and older from purchasing or obtaining legal cannabis in the same way they purchase other consumer goods—including food, alcoholic beverages, opioids and scheduled pharmaceuticals.

This is incorrect as a matter of law. As discussed in further detail below, well-established judicial precedents prohibit the unchecked exercise of local police power that would be necessary to enact such bans. And as already discussed above, the plain meaning of the language in Prop 215, Prop 64 and MAUCRSA conflicts with and pre-empts such local bans and the rights granted under HSC Sec. 11362.1; to the extent the voters and legislators intended to make those individual rights subject to BPC Sections 26090 and 26200, they would have done so in HSC Sec. 11362.1(a). But they didn't.

Taking the plain meaning of the language of HSC Sections 11362.1 and 11362.5 into account, a more reasonable and defensible interpretation of "in compliance with … local law as adopted under Section 26200," would lead to the conclusion that local governments are allowed to *regulate (but not prohibit)* out-of-town delivery retailers servicing their residents.

D. BPC Sec. 26200 Only Reaffirms "Existing Local Authority" to Regulate Land Uses, Without Expanding It

Local governments cite the authority granted under BPC Sec. 26200 to uphold bans on cannabis delivery into their jurisdiction. Sec. 26200 states, in relevant part:

> (a)(1) This division shall not be interpreted to supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate businesses licensed under this division, including, but not limited to, local zoning and land use requirements, business license requirements, and requirements related to reducing exposure to secondhand smoke, or to completely prohibit the establishment or operation of one or more types of businesses licensed under this division within the local jurisdiction;

[9] HSC Sec. 11362.5(b)(1)(C).

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

While this language seemingly gives local governments broad authority, this authority is by no means unfettered, and is limited by both conflicting state law under MAUCRSA as discussed above and pre-existing judicial precedents. Though Sec. 26200 does authorize local governments to deny land use entitlements and business licensing to cannabis businesses with a principal place of business within their borders, it only reaffirms and preserves the authority locals already have under existing police powers and land use authority.

1. The Powers Granted Under BPC Sec. 26200 are Expressly Limited by Other Provisions of State Law

Additionally, if the individual rights to purchase, obtain and grow under HSC Sec. 11362.1 are explicitly *not* subject to BPC Sec. 26200 as discussed above, and further HSC Sec. 11362.2 expressly limits the authority of local governments to regulate activity pursuant to HSC Sec. 11362.1 "inside a private residence", then as a matter of statutory construction, the "existing local authority" referenced in 26200 is circumscribed by both 11362.1 and 11362.2, and the rights they established for adults and qualified patients over 21 to purchase, obtain and grow cannabis inside their private residence.

In order for local jurisdictions to pass bans on *all* cannabis deliveries (whether or not they implicate a land use), they would need to interpret the language of BPC 26200 in a way that would give them the ability to abrogate those rights by stretching their land use authority.

2. Both Constitutional Law and Well-established Judicial Precedents Prohibit the Expanded Use of Police Powers in the Manner Used by Banning Jurisdictions

In order to assert the authority to ban delivery to private homes, banning jurisdictions would need to wield police power in an unprecedented fashion. Local governments' land use authority is already broad,[10] and based on their exercise of police power.[11] Per Sec. 7 of Article XI of the California Constitution, counties and incorporated cities may make and enforce within its limits "all

[10] "[T]he legislature intends to impose 'only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters.' Cal. Govt. Code §65800; *DeVita v County of Napa* (1995) 9 Cal.4th 763, 782." *The California Municipal Law Handbook*, § 10.1).

[11] "In California, the basis for all land use regulations is the police power. *See* Cal. Constitution art XI, §7." *The California Municipal Law Handbook*, §§ 10.1. "Comprehensive zoning regulations lie within the police power of local governments." *The California Municipal Law Handbook*, § 10.87. *See also, Village of Euclid v Ambler Realty Co*. (1926) 272 US 365, 388.

local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[12] Accordingly, a city may adopt an ordinance in areas that affect the health, safety, and welfare of its citizens. *See S.D. Myers, Inc. v City & County of San Francisco* (9th Cir. 2003) 336 F.3d 1174.[13]

However, this authority is *not unfettered*, and there are several constitutional and judicially-imposed limits on the exercise of local police powers generally and land use authority specifically.

(a) Local Government Cannot Impose or Enforce a Local Ordinance Which is Pre-Empted by State Law

First, Sec. 7 of Article XI of the California Constitution, imposes a limitation on the exercise of that power whereby local laws may not conflict with "general" laws. When conflicting general laws are adopted, the state law is said to have "preempted" the power of a city to adopt a local law.[14] Thus, a local jurisdiction may not enact an ordinance that conflicts with the constitutions or the laws of the state or federal governments.[15]

For example, per Section 22 of Article XX of the California Constitution, the state has exclusive power to regulate the manufacture, sale, purchase, possession, and transportation of alcoholic beverages. As such, local regulation of alcohol is constitutionally preempted and is subject to legislative authorization.

As discussed previously, MAUCRSA expressly establishes the rights of individuals to purchase and obtain cannabis at their private residence, as well as the right of licensed delivery services to use the public roads to reach a private residence, notwithstanding conflicting local laws which purport to restrict those rights. These conflicting local ordinances are expressly pre-empted as a result.

(b) Local Bans On All Delivery Do Not Promote the Public Health, Morals, Safety, or General Welfare of Local Residents, Conflict with California's Stated Policy Interests, and Are Therefore Unconstitutional.

Second, the rights to substantive due process and equal protection under the 14th Amendment to the United States Constitution and Sec. 7 of Article I of the California Constitutions are

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12 *The California Municipal Law Handbook*, § 1.15. The police power of a state is its right to adopt regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. *Chicago, B. & Q. Ry. Co. v Illinois* (1906) 200 US 561, 592.

13 *The California Municipal Law Handbook*, § 1.235.

14 *See The California Municipal Law Handbook*, § 1.17. *See also Birkenfeld v City of Berkeley* (1976) 17 Cal.3d 129, 140, which stands for the proposition that a local government's police power can be applied only within its own territory and is *subject to preemption* by general state law, but otherwise is as broad as the police power exercisable by the state legislature.

15 *The California Municipal Law Handbook*, § 1.235.

"complementary limitations on the police power."[16] Thus, the exercise of the police power must be reasonably related to a legitimate governmental purpose.[17] A reasonable basis in fact to support the legislative determination of the regulation's wisdom and necessity must exist.[18] Put differently, local ordinances passed pursuant to police powers must have a reasonable tendency to promote the public health, morals, safety, or general welfare of the community.[19]

With respect to retail deliveries of cannabis, the state has already implemented regulations addressing the potential public safety issues that could arise in connection with such deliveries. The Bureau of Cannabis Control's emergency regulations (i) strictly limit the hours of retail cannabis deliveries, (ii) prescribe the manner in which delivery orders may be accepted and processed, (iii) require retailers to verify the age and identity of delivery customers, (iv) regulate the age, qualifications and conduct of the delivery drivers, (v) disqualify prospective retail licensees with criminal records for violent felonies and other relevant offenses, (vi) require delivery drivers to wear employee badges identifying the licensed retailers for whom they work, (vii) mandate minimum security requirements for all delivery vehicles and their contents, (viii) limit the amount of cannabis that may be carried in a single vehicle and delivered to a single customer, and (ix) prohibit deliveries to public lands and buildings.

Furthermore, any remaining impacts on public health, morals or general welfare—stemming from the delivery of a legal product, with medicinal properties, within legal limits, and in full compliance with state laws and regulations—are either non-existent or cannot be substantiated by banning jurisdictions. Not only do total delivery bans thus lack a reasonable tendency to promote the public health, morals, safety and general welfare of the local communities they impact, they actually *harm* the health and well-being of non-ambulatory and disabled patients who live in jurisdictions which ban *both* cannabis business-related land uses in their communities *and* medical cannabis deliveries to residents.

Even if a local government could enunciate a rational purpose for a total ban on cannabis deliveries, it would be at odds with, and pre-empted by, the state's explicit governmental purposes behind both Prop 215 and Prop 64. As set forth in the Compassionate Use Act, one of the express goals of the state is specifically to "*implement a plan to provide for the safe and affordable*

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16 *The California Municipal Law Handbook*, § 10.425.

17 *The California Municipal Law Handbook*, § 1.32. *See also Birkenfeld v City of Berkeley* (1976) 17 Cal.3d 129, 159. "Most equal protection challenges are subject to the rational-relationship test, which is similar to the rational-basis test applied to substantive due process and police power challenges. *See Griffin Dev. Co. v City of Oxnard* (1985) 39 Cal.3d 256, 263." *The California Municipal Law Handbook*, § 10.439.

18 *The California Municipal Law Handbook*, § 1.32. *See also Consolidated Rock Prods. Co. v City of Los Angeles* (1962) 57 Cal.2d 515, 522.

19 *The California Municipal Law Handbook*, § 1.32. *See also Carlin v City of Palm Springs* (1971) 14 Cal.App.3d 706, 711 (city has broad discretion in determining what is reasonable in endeavoring to protect public health, safety, morals, and general welfare of community).

distribution of marijuana to all patients in medical need." As stated in the previous paragraph, banning home deliveries of cannabis would force many medical cannabis patients to travel outside their homes and communities to obtain medicine, and force at least some patients to resort to the criminal black market for untested, unregulated and potentially unsafe products. And as set forth in MAUCRSA, the state of California has stated its intention to stamp out the black market, including unlicensed delivery (in part, by guaranteeing the rights of licensed, tax-paying cannabis retailers to deliver to individuals). If local governments make delivery by licensed non-storefront retailers unlawful, this will upend the state's policy goals by creating demand for black market delivery services in those local jurisdictions and greatly reducing the addressable legal market for licensed, regulated cannabis businesses.

(c) Total Local Bans on Delivery Violate Fundamental Rights, Including the Right to Use One's Private Residence in Compliance with Both State Law and Established Custom under Common Law, Making them Unconstitutional.

Finally, fundamental rights granted under our state and federal constitutions also act as a break on the abuse of police powers. So, for example, while "[a] city has the authority to impose curfews in an effort to protect the general safety and welfare of the public under its police powers … These powers must, however, be balanced against fundamental rights," such as the right to travel, right to freedom of movement and interstate travel, and the freedom of association.[20] Any exercise of land use authority that does not conform to the foregoing limits "constitutes arbitrary and discriminatory regulation is not within the proper exercise of the city's police power and is thus invalid."[21]

It is hard to imagine a more arbitrary and discriminatory exercise of land use authority than to single out cannabis consumers *alone* for an abrogation of their property rights. The right to use one's private residence to receive home deliveries of lawful consumer goods is customary and incidental to residential use. Consequently, regulating the right to receive home deliveries of lawful consumer goods in residential zones has not traditionally been within the ambit of local land use authority. Given all of the foregoing analysis herein, there is no basis treating deliveries of legal, regulated cannabis goods differently from receiving groceries, restaurant take-out, pharmaceuticals and/or other consumer goods at a private residence.

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[20] *The California Municipal Law Handbook*, § 9.79. *See also Carroll v U.S.* (1925) 267 US 132, 153, 45 S Ct 280 (right to travel) and *Nunez v City of San Diego* (9th Cir 1997) 114 F.3d 935, 944 (right to freedom of movement and interstate travel).

[21] *The California Municipal Law Handbook*, § 3.112. *See also Arnel Dev. Co. v City of Costa Mesa* (1981) 126 Cal.App.3d 330.

Furthermore, given that local governments cannot stop licensed delivery retailers from traveling on public roads, they could not enforce such over-reaching delivery bans without violating individual residents' fundamental constitutional rights to privacy in the home and freedom from unreasonable searches of their private residences. Note that MAUCRSA also expressly states that the purchase and acquisition of lawful amounts of cannabis cannot form the basis of a search. *See* HSC Section 11362.1(c), discussed earlier.

IV. Conclusion: State Law Clearly Pre-Empts and Prohibits Blanket Bans on Delivery of Retail Cannabis by Local Governments; Clarification of The Law on This Point via SB 1302 is Necessary to Repel and/or Repeal Unlawful Local Bans.

As discussed above, MAUCRSA balances the individual rights granted to adults and qualified patients to purchase and obtain cannabis with the preservation of existing local land use authority. Contrary to what some local jurisdictions have asserted, MAUCRSA does not expand local police powers to support total bans on all retail cannabis deliveries, which are expressly pre-empted and unconstitutional. With a few exceptions, MAUCRSA explicitly pre-empts all other state statutes and local ordinances that prohibit adults and qualified patients over 21 from purchasing and obtaining legal cannabis.

Furthermore, MAUCRSA expressly limits local land use authority with regard to home cultivation, prohibiting local regulation of activity inside private residences, and extends that prohibition to purchases inside private residences. Specifically, Prop 64 prohibited local governments from banning cultivation inside a private residence; this is in line with the state's established legal authority to define residential uses, precluding local land use authority. By implication, purchasing and obtaining cannabis inside a private residence is protected by Prop 64, and is incidental to residential use.

Additionally, local jurisdictions may not prevent delivery of cannabis on public roads under MAUCRSA. In fact, the plain meaning of BPC Sec. 26090(e) provides that local governments may not prohibit home deliveries to residents, but that they may reasonably regulate, but not prohibit entirely, retail cannabis deliveries by licensees to private residences.

Finally, BPC Sec. 26200 of MAUCRSA only reaffirms existing local land use authority to regulate land uses, without expanding that authority. As previously stated, the powers granted to local governments under BPC Sec. 26200 are expressly limited by other provisions of state law, including MAUCRSA. Even if express pre-emption were not present, both constitutional law and well-established judicial precedents prohibit the expanded use of police powers in the manner used by banning jurisdictions. First, local government cannot impose or enforce a local ordinance which is pre-empted by state law. Second, local bans on all delivery do not promote the public health, morals,

safety, or general welfare of local residents, and they conflict with California's stated policy interests in eliminating the black market for cannabis in California; as such local delivery bans are therefore unconstitutional. Third, total local bans on delivery violate fundamental rights, Including the right to use one's private residence in compliance with both state law and established custom under common law, making such total local bans on delivery unconstitutional.

As if those reasons weren't enough to pass SB 1302, it should be noted that clarifying the law will have the added benefits of opening up local markets to smaller, licensed non-storefront retail delivery businesses. These businesses are often owned and operated by small mom-and-pop enterprises, as well as people of color who have hitherto been discouraged to join the legal cannabis industry by the racially-biased enforcement of cannabis prohibition. Furthermore, opening up more local markets will be a welcome development for struggling small farmers throughout the state, and will meaningfully address the widely publicized shortfalls in expected state tax revenues from the cultivation and sale of cannabis.