U.S. Hemp Roundtable, Inc., *et al.*

v.

California Department of Public Health, *et al.*

Case No. 24STCP03095

Hearing Date: October 10, 2024
Location: Stanley Mosk Courthouse
Department: 82
Judge: Stephen I. Goorvitch

ORDER DENYING *EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER

BACKGROUND

In 2021, the Legislature passed Assembly Bill ("AB") 45, which amended the Sherman Food, Drug, and Cosmetic Laws, Health and Safety Code sections 109875 *et seq.* (the "Act") to authorize retail sale of food, drug, and cosmetic products containing industrial hemp. These products were defined as having no more than 0.3% delta-9 THC on a dry weight basis. THC is the psychoactive component in marijuana products. Since AB 45 took effect, industrial hemp food—*e.g.*, gummy candies, chocolate cereal bars, and cookies—have become widely available in retail food stores, gas stations, and drug stores throughout California and are shipped directly to California through online purchases. There were no limitations on the age of the consumer, serving size, and intoxicating content. As a result, anyone—including children—could purchase these products. Manufacturers could extract THC from hemp and add the THC to food in amounts exceeding those allowed in legal cannabis edible packages. Some manufacturers, well-aware of this loophole, advertised these edible products as affording a "high" akin to that found in products sold in marijuana dispensaries. As a result, over the past three years, the Department received numerous complaints, including one involving a death and seven others involving illness or injury.

Health and Safety Code section 110065 authorizes the Department of Public Health (the "Department" or the "State") to "adopt any regulations that it determines are necessary" for enforcement of the Act and to do so on an emergency basis. Therefore, on September 13, 2024, the Department issued a notice titled: "Notice of Proposed Emergency Regulatory Action: Serving Size, Age, and Intoxicating Cannabinoids for Industrial Hemp; DPH-24-005-E." The regulations took effect on September 23, 2024, and did three things. First, the emergency regulations state: "A person shall not manufacture, warehouse, distribute, offer, advertise, market, or sell industrial hemp final food products intended for human consumption including food, food additives, beverages, and dietary supplements that are above the limit of detection for total THC per serving." (RJN Exh. A.) Second, the regulations create an age restriction of 21 years old for the offer or sale of the remaining industrial hemp final food products. Third, the emergency regulations limit the serving and package sizes of these products.

Petitioner U.S. Hemp Roundtable, Inc. ("USHRT") and individual manufacturers (collectively, "Petitioners") filed a verified petition for writ of mandate challenging the emergency regulations and now seek to stay their implementation until the court can resolve this legal challenge. Following a lengthy hearing, the court took the matter under submission. Now, the court denies this *ex parte* application for a temporary restraining order.

PROCEDURAL HISTORY

Petitioners filed this action on September 25, 2024. Petitioners sought leave to file an oversized brief in support of their *ex parte* application for a temporary restraining order, so the court held a hearing on October 4, 2024. During the hearing, the court offered to set a hearing on a noticed motion for preliminary injunction this month, but Petitioners' counsel indicated that he intended to go forward on an *ex parte* basis. The court authorized the parties to file oversized briefs but amended the schedule accordingly. The court ordered the *ex parte* application to be filed on Friday, October 4, 2024; the court ordered the opposition to be filed on or before Tuesday, October 8, 2024; and the court scheduled the hearing for Thursday, October 10, 2024.

EVIDENTIARY ISSUES

Petitioners seek judicial notice of the following exhibits: (A) Notice of Proposed Emergency Regulatory Action, (B) Assembly Bill Number 45, (C) A copy of a dictionary page, (D) A copy of a legal memorandum from the General Counsel of the Department of Agriculture, (E) Portions of the Agriculture Improvement Act of 2018, and (F) Portions of the Congressional Report for the Agriculture Improvement Act of 2018. The State does not object to this request. Therefore, the request for judicial notice is granted.

LEGAL STANDARD

The purpose of a temporary restraining order and preliminary injunction is to preserve the *status quo* pending a decision on the merits. (*Major v. Miraverde Homeowners Ass'n.* (1992) 7 Cal. App. 4th 618, 623.) This is a drastic remedy. "To issue an injunction is the exercise of a delicate power, requiring great caution and sound discretion, and rarely, if ever, should be exercised in a doubtful case." (*Willis v. Lauridson* (1911) 161 Cal. 106, 117.) This is especially true here, because Petitioners are asking this court to stop the implementation of emergency regulations enacted by the executive branch, and to do so before a trial on the merits with only four court days' notice.

> Where, as here, the defendants are public agencies and the plaintiff seeks to restrain them in the performance of their duties, public policy considerations also come into play. There is a general rule against enjoining public officers or agencies from performing their duties. This rule would not preclude a court from enjoining unconstitutional or void acts, but to support a request for such relief the plaintiff must make a significant showing of irreparable harm.

(*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1471.)

In deciding whether to grant injunctive relief before trial, the court looks to two factors, including "(1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief." (*White v. Davis* (2003) 30 Cal.4th 528, 553-54.) The factors are interrelated, with a greater showing on one permitting a lesser showing on the other. (*Dodge, Warren & Peters Ins.*

Services, Inc. v. Riley (2003) 105 Cal.App.4th 1414, 1420.) However, the party seeking an injunction must demonstrate at least a reasonable probability of success on the merits. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 73-74.) The party seeking the injunction bears the burden of demonstrating both a likelihood of success on the merits and the occurrence of irreparable harm. (*Savage v. Trammell Crow Co.* (1990) 223 Cal.App.3d 1562, 1571.)

DISCUSSION

A. Petitioners Do Not Demonstrate Sufficient Irreparable Harm

Petitioners do not demonstrate that these regulations will cause widespread and catastrophic destruction of the hemp industry. As an initial matter, the court notes that at least half of USHRT's members operate outside California. (See Meachum Decl. ¶ 2.) Under the emergency regulations, Manufacturers can sell non-final food products with detectable levels of THC (*e.g.*, hemp flour, lotions, etc.) Manufacturers can sell final form food products without detectable levels of THC. Manufacturers can sell THC through the legal cannabis system in California, *i.e.*, with a license. Putting aside that Petitioners' declarations are speculative, at heart, they complain of lost revenue, which is not persuasive in establishing irreparable harm. (See, e.g., *Bradley v. CVS Pharmacy, Inc.* (2021) 64 Cal.App.5th 902, 920.) The mere fact that these losses may be unrecoverable is not a basis to issue a temporary restraining order.

> While it is true that if a movant seeking a preliminary injunction will be unable to sue to recover any monetary damages against a government agency in the future because of, among other things, sovereign immunity, financial loss can constitute irreparable injury, the fact that economic losses may be unrecoverable does not absolve the movant from its considerable burden of proving that those losses are *certain, great and actual* .... In other words, the mere fact that economic losses may be unrecoverable does not, in and of itself, compel a finding of irreparable harm.

(*Save Jobs USA v. U.S. Department of Homeland Security*, 105 F.Supp.3d 108, 114 (D.D.C. 2015.)

Even if the court gives Petitioners the benefit of the doubt and assumes that certain hemp-related businesses cannot operate effectively under the new regulations, Petitioners still do not demonstrate sufficient irreparable harm. The court acknowledges that economic loss can constitute irreparable harm under certain circumstances, *e.g.*, if a company will be shuttered. But any discussion of irreparable harm necessarily requires consideration of harm that is likely to result from granting the stay. The State's interest in protecting the health and safety of its residents—especially children—and closing a loophole that permitted the distribution of high doses of THC outside the regulated cannabis system outweighs the potential economic harm referenced in Petitioners' declarations.

The State argues that these regulations were enacted due to widespread abuse that posed a public health risk, especially to children:

> Since AB 45 took effect, industrial hemp food products have become widely available in retail food stores, gas stations and drugstores throughout California and are shipped directly to California consumers through online purchasing. Until adoption of the challenged emergency regulations ("Emergency Regulations"), these products were available without limitations on the age of the consumer, serving size, and intoxicating content. Critically, although AB 45 imposed a concentration limit of 0.3% THC, nothing in AB 45 limits the total dose of total THC in each serving or package. The result is that a package containing a 2-ounce industrial hemp cookie could contain up to 180 mg of THC which far exceeds the allowed 100 mg THC limit in a legal cannabis package—which can impair a person, particularly a youth, while otherwise meeting AB 45's requirements.

(Opposition to *Ex Parte* Application ("Oppo.") at 8:21-9:2.) The State's argument is supported by the record. The Department discovered that hemp consumables with THC "were widely available and accessible to any person, regardless of age." (Declaration of Amir Javed ¶ 10.) These products included "high-THC food products, such as gummy candies, peanut butter bites, and cookies, advertised as industrial hemp and sold to California consumers in retail food stores and markets, smoke shops, and online." (*Id.* ¶ 11.) These products were advertised as providing the same narcotic effect as marijuana. For example, Petitioner Cheech and Chong's advertised hemp consumables offering a "full body buzz that'll have you feel like you're floating in zero gravity" and "[t]he same potency edibles you'd find at a dispensary, but legally delivered straight to your door," as well as those "designed for the THC connoisseur craving that cosmic high without the hassle." (*Id.* ¶ 10.) Petitioner Sunflora, Inc. advertised hemp gummies with THC by saying the gummies "satisfy even the most experienced cannabis connoisseurs" and the users would "[e]njoy a euphoric headspace." (*Ibid.*)

Consumers were able to eat industrial hemp food and ingest a higher THC dosage than legal limits. (*Ibid.*) As a result, the Department began receiving complaints. Between October 6, 2021, and September 12, 2024, the Department received a total of 53 complaints involving industrial hemp products. (*Id.* ¶ 7.) From October 6, 2021, to 2022, there were approximately 13 complaints. (*Ibid.*) In 2023, there were approximately 20 complaints. To date in 2024, there have been approximately 20 complaints. (*Ibid.*) Among these complaints, the Department received eight reported complaints of illness and injury. (*Id.* ¶ 8.) One complaint involved the death of a child who consumed gummies that contained THC. (*Id.* ¶ 9.)

This potential harm to Californians, especially children, outweighs the potential that individual hemp businesses will not be able to adapt to the new regulations. At the hearing, Petitioners argued that certain consumers use these products for medicinal purposes. The State's counsel argued that the record does not support this argument. Regardless, Petitioners' argument is not persuasive. To the extent the medicinal benefit comes from the hemp plant itself, those products may still be sold in final food form (without THC). To the extent the medicinal benefit comes from the THC, consumers can buy THC products in dispensaries, *e.g.*, oil that can be ingested or other THC edibles. For purposes of evaluating irreparable harm, it matters not

whether the THC comes from marijuana or hemp plants. It matters only that THC is available to consumers who use it for medicinal purposes. Accordingly, Petitioners cannot demonstrate sufficient irreparable harm for injunctive relief at this stage.

B. Petitioners Cannot Demonstrate a Sufficient Likelihood of Success on the Merits

Given that the analysis of irreparable harm strongly favors the State, Petitioners must demonstrate a high likelihood of success on the merits to obtain injunctive relief at this stage. (See *King v. Meese* (1987) 43 Cal.3d 1217, 1226-1228.) Petitioners contend that the emergency regulations violate the Administrative Procedures Act (the "APA") and are unconstitutionally vague. However, there is a genuine question whether Petitioners will prevail.

1. Petitioners do not show the State lacks authority to enact the regulations

Petitioners do not demonstrate that the State necessarily lacks authority to enact the emergency regulations under the statute. Petitioners contend that:

> Because the Department chose to not implement an age restriction or THC serving or package restrictions in its initial emergency regulations and initial regulations, the Department relinquished its right to do so pursuant to law and cannot now enact such provisions by utilizing the emergency rulemaking procedures rather than the regular procedures statutorily mandated.

(Petitioners' Memorandum of Points & Authorities in Support of *Ex Parte* Application ("Mot.") at 6-7, emphasis omitted.) Petitioners rely on Health and Safety Code section 110065, which provides in relevant part:

> (a) ***The department may adopt any regulations that it determines are necessary for the enforcement of this part.*** . . . The department shall, insofar as practicable, make these regulations conform with those adopted under the federal act or by the United States Department of Agriculture . . . .
>
> ***(b)(1) The department may adopt emergency regulations to implement this division.***
>
> (2) The department may readopt any emergency regulation authorized by this section that is the same as, or substantially equivalent to, an emergency regulation previously adopted as authorized by this section. That readoption shall be limited to one time for each regulation.
>
> (3) Notwithstanding any other law, the initial adoption of emergency regulations and the readoption of emergency regulations authorized by this section shall be deemed an emergency and necessary for the immediate preservation of the public peace, health, safety, or general welfare....
>
> (c) Initial regulations regarding industrial hemp shall be exempt from the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of

> Title 2 of the Government Code), except that the department shall post the proposed regulations on its internet website for public comment for 30 days....

(Health & Safety Code § 110065, emphasis added.)

The court is not persuaded that Petitioners' interpretation of section 110065 is necessarily correct. The rules governing the interpretation of statutes and regulations are well-settled and clear:

> We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. To determine legislative intent, we turn first to the words of the statute, giving them their usual and ordinary meaning. When the language of a statute is clear, we need go no further. However, when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.

(*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340, citations omitted.) "When interpreting statutory language, we may neither insert language which has been omitted nor ignore language which has been inserted." (See *People v. National Auto. & Cas. Ins. Co.* (2002) 98 Cal.App.4th 277, 282.) "[I]nterpretations which render any part of a statute superfluous are to be avoided." (*Young v. McCoy* (2007) 147 Cal.App.4th 1078, 1083.)

Subdivision (a) authorizes the Department to adopt "any regulations." Subdivision (b)(1) states that these regulations may be adopted on an "emergency" basis in order to "implement this division." Division 104 governs all of environmental health, including environmental planning, product safety, and food products. Section 110065 places no time limit or deadline on the Department's authority to adopt emergency regulations related to industrial hemp. (*Cf.* Rev. & Tax. Code § 34013(e) [specifying a deadline of January 1, 2024, for the California Department of Tax and Fee administration to adopt emergency regulations].)

Petitioners argue that this authority is limited to initial regulations because subdivision (b)(3) references the "initial regulations." In fact, that section merely states that the adoption and readoption of the initial regulations qualifies as an emergency. That section does not preclude the Department from adopting additional emergency regulations based upon new circumstances if necessary to implement that division. Indeed, if the court adopted Petitioners' argument—that the Department forfeited the ability to adopt emergency regulations on certain topics (*i.e.*, age restrictions or THC serving or package restrictions) simply because it did not do so with the April 2022 regulations—the Department could not "adopt emergency regulations to implement this division" in contravention of the plain language. When interpreting a statute or regulation, the court "must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*People v. Jenkins* (1995) 10 Cal.4th 234, 246.)

Petitioners contend that section 110065 "explicitly excludes age restrictions and serving sizes and packaging from the emergency regulations." (Mot. at 12:5-6.) In fact, section 110065(c) states, in pertinent part:

> Initial regulations regarding industrial hemp ***shall be exempt from the Administrative Procedure Act*** (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).... ***This exemption does not apply to regulations adopted pursuant to Section 111921.3 or 111922***.

(Health & Safety Code § 110065(c), emphasis added.) Sections 111921.3 and 111922, respectively, authorize the Department to adopt regulations pertaining to "active cannabinoid concentration per serving size" and other serving size restrictions, and "imposing an age requirement for the sale of certain industrial hemp products upon a finding of a threat to public health." As discussed, the State may do so on an emergency basis.

Based upon the foregoing, there is a genuine question whether Petitioners will prevail on the merits. Therefore, Petitioners have not made the requisite showing to obtain injunctive relief at this preliminary stage.

2. Petitioners do not show the State's findings are necessarily deficient

Petitioners argue that the Department failed to make findings supported by substantial evidence, as required by the APA when enacting emergency regulations. In relevant part, section 11346.1 of the APA provides:

> Any finding of an emergency shall include a written statement that contains the information required by paragraphs (2) to (6), inclusive, of subdivision (a) of Section 11346.5 and a description of the specific facts demonstrating the existence of an emergency and the need for immediate action, and demonstrating, by substantial evidence, the need for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency. The finding of emergency shall also identify each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies.

(Gov. Code § 11346.1(b)(2).)

The State appears to have complied with these requirements. The statute states: "[T]he initial adoption of emergency regulations and the readoption of emergency regulations authorized by this section shall be deemed an emergency and necessary for the immediate preservation of the public peace, health, safety, or general welfare." (Health & Safety Code § 110065(b)(3).) Section 110065 is found in Division 104 of the Health and Safety Code, which includes Part 5, the Act, and Chapter 9, Industrial Hemp, sections 111920, *et seq.* Thus, the Legislature has already deemed an emergency for regulations pertaining to industrial hemp. Petitioners have failed to cite a published appellate decision or other court decision invalidating emergency regulations that are based on a similar legislative finding of emergency. (See Oppo. 16:1-8 & fn. 10.)

In addition, the State identified new circumstances giving rise to the new emergency regulations, *viz.*, cases of illness, hospitalization, and death. For example, the "Finding of Emergency" states:

- "[T]he proposed emergency regulations are necessary to address a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, and general welfare of Californians."

- "In California and nationwide there have been significant reports of hospitalizations among teenagers and young adults, highlighting the health risks for these age groups."

- "[T]he proposed cannabinoids can cause serious side effects including seizures, organ damage, hallucinations, paranoia, vomiting, agitation, and in extreme cases even death, all of which are signs of intoxication that has led to an increase in hospitalization, poisoning, and increased emergency department visits across California and nationwide, highlighting the urgent need for regulation."

(RJN Exh. A at 2.) The "Informative Digest/Policy Statement Overview" identifies the loophole necessitating these emergency regulations:

> The current law allows for up to 0.3% of total THC for extracts in industrial hemp final form products with no limits on the serving size of total THC. Depending on the size of the product, an individual could receive significantly more THC in an industrial hemp product compared to a cannabis product.

(*Id.*, Exh. A at 6.) This section also identifies the new circumstances giving rise to the new emergency regulations:

- "Since AB 45 was signed in late 2021, many food and beverage products are produced with intoxicating levels of total THC, and some have caused illness, injury, and death." (*Ibid.*)

- "The Department has documented cases of injuries and illnesses within California caused by industrial hemp products with intoxicating cannabinoids, and there are known cases of the use of intoxicating cannabinoids causing death to persons located outside California." (*Id.*, Exh. A at 7.)

Petitioners have not shown that these findings are so clearly deficient under section 11346.1 of the APA and related case law as to support a temporary restraining order. (See Mot. at 9-11.)

Petitioners make additional arguments but none is persuasive. To the extent Petitioners suggest that a lack of legislative action shows there is no emergency, the court disagrees. (See Mot. at 18-19.) The Legislature expressly authorized the Department to promulgate the emergency regulations at issue. (*See* Health & Safety Code §§ 111925(b), 111922(a), 111921.3,

111921.7(b), 110065(b) & (c).) Thus, it was not necessary for the Legislature to take further action itself to establish the existence of an emergency.

At the hearing, Petitioners' counsel argued that the State waited three years to enact these emergency regulations, suggesting there is no emergency. The fact that the State waited almost three years to enact these regulations does not undermine the finding of an emergency. The emergency became clear over time based upon the proliferation of offending products and the reports of illness, hospitalizations, and deaths. Had the State enacted these regulations sooner—before these issues became clear—Petitioners undoubtedly would have argued that there was an insufficient record to support the finding of emergency.

The court must afford "substantial deference" to the agency's finding and "may only overturn such an emergency finding if it constitutes an abuse of discretion by the agency." (*Western Growers Association v. Occupational Safety and Health Standards Board* (2021) 73 Cal.App.5th 916, 933.) Thus, Petitioners have not demonstrated a sufficient likelihood of success on the merits.

3. Petitioners do not show the regulations conflict AB 45

Petitioners contend that the emergency regulations conflict with provisions in Assembly Bill 45, section 110065, and other provisions of the Health and Safety Code governing industrial hemp products. (Mot. at 11-18.) Some of these arguments have already been considered by the court in the analysis of Petitioner's APA claims. Petitioners also contend that the emergency regulations impermissibly change the definition of hemp under state law. (*Id.* at 3-17.)

Health and Safety Code section 11018.5 defines "industrial hemp" as:

> [A]n agricultural product, whether growing or not, that is limited to types of the plant Cannabis sativa L. and any part of that plant, including the seeds of the plant and all derivatives, extracts, the resin extracted from any part of the plant, cannabinoids, isomers, acids, salts, and salts of isomers, with a delta-9 tetrahydrocannabinol concentration of no more than 0.3 percent on a dry weight basis.

(Health & Safety Code § 11018.5(a).) Section 111920(g) defines "industrial hemp product" as "a finished product containing industrial hemp that meets all of the following conditions: (A) Is a cosmetic, food, food additive, dietary supplement, or herb. (B)(i) Is for human or animal consumption.... (iii) Does not include THC isolate as an ingredient. (Health & Safety Code § 11920(g).)

Petitioners fail to show that these definitions restrict the Department's ability to impose the regulations at issue in this petition. To the contrary, the Legislature has authorized the Department to "cap the amount of total THC concentration at the product level" (Health & Safety Code § 111925(b)); to "determine ... active cannabinoid concentration per serving size" (Health & Safety Code § 111922(a)); and "include any other cannabinoid, in addition to those expressly listed in subdivision (*l*) of Section 111920, in the definition of 'THC' if the department

determines ... that the cannabinoid causes intoxication." (Health & Safety Code § 111921.7(b).) Consistent with this statutory authorization, the emergency regulations add intoxicating cannabinoids to the definition of THC and place a cap of zero on the detectable amount of THC in products intended for human consumption. (RJN Exh. A.)

4. Petitioners do not show the regulations conflict with the Farm Bill

Petitioners argue that the emergency regulations are invalid under the Agriculture Improvement Act of 2018, commonly known as the "Farm Bill." Petitioners argue that the Farm Bill broadly defined "hemp" and legalized hemp products with a delta-9 THC concentration of not more than 0.3% on a dry weight basis. (Mot. at 19-20.) Petitioners argue that the Farm Bill "expressly prohibits states from interfering with or impeding the transportation or shipment of hemp and hemp products in accordance with the 2018 Farm Bill." (*Id.* at 20:11-13.) The Farm Bill does not prevent states from prohibiting the manufacture or storage of hemp final form food products containing detectable levels of THC. Nor does it prevent states from banning sales of these products within their borders. As Petitioners acknowledges, the Conference Report for the 2018 Farm Bill states that "state and Tribal governments are authorized to put more restrictive parameters on the production of hemp, but are not authorized to alter the definition of hemp or put in place policies that are less restrictive." (*Id.* at 20:1-5; *see also* RJN Exh. F.) Specifically, the statute states: "Nothing in this subsection preempts or limits any law of a State or Indian tribe that [¶] regulates the production of hemp; and [¶] is more stringent than this subchapter." (7 U.S.C. § 1649p.) Simply, the State of California can prohibit the manufacture, storage, and sale of hemp final form food products containing THC within its borders.

At the hearing, Petitioners focused on the part of the emergency regulations that prohibit businesses in California from selling prohibited food to residents of other states, *i.e.*, through the internet. Petitioners argue that this conflicts with the Farm Bill's prohibition: "No State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products" in interstate commerce. The State argues that this prohibition applies to interstate transportation of non-edible hemp products, because Title 21, United States Code, section 331 independently prohibits interstate transportation of final food products containing THC. Given this dispute, Petitioners do not establish a sufficient likelihood of success on the merits. Moreover, the court is skeptical of Petitioners' argument that federal law would permit the trafficking of food containing high doses of THC harvested from hemp; the same products containing the same drug harvested from marijuana are unlawful under federal law. Even if Petitioners are correct, however, they still would not be entitled to a temporary restraining order staying the prohibition on interstate sales. Because Petitioners cannot lawfully "manufacture" or "warehouse" the products in California, the prohibition on interstate sales does not cause irreparable harm, since there is nothing lawfully located in California to ship to another state. In other words, even if the court permitted internet sales to residents of other states, there still would be no sales from California sellers, since no products can be manufactured and warehoused within the state. Accordingly, the balancing of harms does not favor Petitioners on this point.

It is unclear whether the emergency regulations prohibit the transportation of prohibited products through California (assuming it is lawful under federal law), *e.g.*, if a manufacturer in Nevada sells a product to a customer in Hawaii and the package must be routed through

California. The emergency regulations prohibit distribution, not transportation. Although the emergency regulations do not define the term "distribute," undefined terms are construed according to their ordinary, common meaning. (See, e.g., *Limon v. Circle K Stores Inc.* (2022) 84 Cal.App.5th 671, 701.) The term "distribute" means to "deliver," *i.e.*, to a purchaser. (See Black's Law Dictionary, 12th ed. (2024).) This does not necessarily encompass "transportation" through the state if the customer is located elsewhere. Regardless, Petitioners do not develop a record that any ban on transportation through California would cause irreparable harm supporting a temporary restraining order. Petitioners' focus is on the ban on manufacture, marketing, and sale of prohibited products, not mere transportation.

5. Petitioners do not show the emergency regulations are void for vagueness

Petitioners contend that the emergency regulations are void for vagueness because they do not sufficiently define the standard of "no detectable amount of THC" and the "limit of detection." (Mot. at 21-23.) A statute or regulation is unconstitutionally vague if it is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." (*Johnson v. U.S.* (2015) 576 U.S. 591, 595.) Petitioners do not argue, or show, that the emergency regulations invite "arbitrary enforcement." Thus, the issue is whether the emergency regulations provide fair notice.

> Because the constitutional guarantee of due process generally secures the right to notice and the opportunity to be heard, a law is unconstitutionally vague only it if fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited or to know what conduct on his or her part will render him or her liable to the law's penalties.

(*Diaz v. Grill Concepts Servs., Inc.* (2018) 23 Cal. App. 5th 859, 870, internal quotations, alterations, and citations omitted.) This is a high burden for Petitioners (especially when seeking injunctive relief before a trial on the merits). "This vagueness standard is hard to meet, and its stringency is not accidental. Language itself is notoriously imprecise. Laws are also accorded a strong presumption of constitutionality that is rebutted only upon a showing that they are clearly, positively, and unmistakably unconstitutional." (*Id.*, internal quotations and citations omitted.)

The emergency regulations are not "clearly, positively, and unmistakably unconstitutional." To the contrary, the emergency regulations clearly state what is prohibited. Section 23100(a) of the regulations clearly specifies that "[e]ach serving in a package shall have no detectable amount of total THC." "Detectable" is defined as "any amount of analyte, subject to the limit of detection," and the "limit of detection" means "the lowest quantity of a substance or an analyte that can be reliably distinguished from the absence of that substance within a specified confidence limit." (RJN Exh. A at 6.) The emergency regulations also specify:

> An independent testing laboratory shall calculate and establish the limit of detection (LOD) for chemical method analyses according to any of the following methods: (1) Signal-to-noise ratio of between 3:1 and 2:1; (2) Standard deviation of the response and the slope of calibration curve using a minimum of 7 spiked blank samples calculated as follows; LOD = (3.3 x standard deviation of the response) / slope of the calibration curve;

or (3) A method published by the United States Food and Drug Administration (USFDA) or the United States Environmental Protection Agency (USEPA).

(RJN Exh. A at § 23100.) Petitioners do not show that the testing methods specified in section 23100 of the regulations are unclear or inadequate. (See Mot. at 21-22.) In that context, and for purposes of this application, the court finds the definitions of "detectable" and "limit of detection" to provide fair notice of the standard for detection to California's cannabis industry. (*See also* Tajkarimi Decl. ¶ 10.)

CONCLUSION AND ORDER

The court has considered all of Petitioners' arguments and finds none to be persuasive. Therefore, the court orders as follows:

1. Petitioner's *ex parte* application for a temporary restraining order is denied.

2. The court denies Petitioner's request for an order to show cause why a preliminary injunction should not issue. The court granted Petitioner's request to file an oversized brief and has fully considered the relevant issues, so additional briefing is not necessary.

3. The court advances the trial setting conference from January 8, 2025, to November 22, 2024, at 9:30 a.m.

4. The court's clerk shall provide notice.

IT IS SO ORDERED

Dated: October 11, 2024

Stephen I. Goorvitch
Superior Court Judge