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U.S. HEMP ROUNDTABLE, INC., CHEECH AND CHONG'S, JUICETIVA INC., BLAZE LIFE LLC, BOLDT RUNNERS CORPORATION, LUCKY TO BE BEVERAGE CO., AND SUNFLORA, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, STANLEY MOSK COURTHOUSE

U.S. HEMP ROUNDTABLE, INC., a non-profit corporation; CHEECH AND CHONG'S, a corporation; JUICETIVA INC., a corporation; BLAZE LIFE LLC, a limited liability company; BOLDT RUNNERS CORPORATION, a corporation; LUCKY TO BE BEVERAGE CO., a corporation; and SUNFLORA, INC., a corporation,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, a state agency, TOMÁS J. ARAGÓN, M.D., Dr.PH., an individual in his capacity as Director and State Public Health Officer of the CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, and DOES 1-50,

Defendants

CASE NO.: 24STCP03095

ASSIGNED FOR ALL PURPOSES TO: HONORABLE STEPHEN I. GOORVITCH DEPARTMENT 82

PLAINTIFF'S EX PARTE APPLICATION FOR ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER; MEMORANDUM OF POINTS AND AUTHORITIES; REQUEST FOR JUDICIAL NOTICE; PROPOSED ORDER

[FILED CONCURRENTLY WITH DECLARATION]

DATE: OCTOBER 3, 2024
TIME: 8:30 A.M.
DEPT: 82

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 3, 2024, at 8:30 a.m., or as soon thereafter as the matter may be heard, in Department 82 of the Los Angeles County Superior Court, located at 111 North Hill Street, Los Angeles, California 90012, U.S. HEMP ROUNDTABLE, INC., CHEECH AND CHONG GLOBAL HOLDINGS, INC. ("Cheech and Chong"), JUICETIVA, INC. ("JuiceTiva"), BLAZE LIFE LLC ("Blaze Life"), BOLDT RUNNERS CORPORATION ("Boldt Runners"), LUCKY TO BE BEVERAGE CO. ("Lucky To Be"), and SUNFLORA, INC. ("SunFlora") (collectively, "Plaintiffs"), will, and hereby do, apply *ex parte* for an order granting a temporary restraining order and an order to show cause re: preliminary injunction restraining and enjoining Defendants from implementing, enacting, enforcing or taking any action in any manner to enforce the Emergency Regulations regarding Serving Size, Age, and Intoxicating Cannabinoids for Industrial Hemp; DPH-24-005E issued by the Defendants CALIFORNIA DEPARTMENT OF PUBLIC HEALTH and TOMÁS J. ARAGÓN, M.D., Dr. P.H., and DOES 1-50 (collectively, "DEFENDANTS") (the "Emergency Regulations").

Basis for Application

Plaintiffs make this Application pursuant to California Rules of Court, Rule 3.1332; the primary statute authorizing injunctive relief in California is Code of Civ. Proc. § 526. Code of Civ. Proc. §§ 527 and 528 authorize preliminary injunctions and temporary restraining orders. A provisional injunction is made pursuant to Civ. Code § 3420, and a permanent or final injunction is made pursuant to Civil Code §§ 3420 and 3422. The purpose of an injunction is to prevent future violations. See *Swift & Co. v. United States* (1928) 276 U.S. 311, 326.

The Plaintiffs seek a Preliminary Injunction restraining and enjoining Defendants from implementing, enacting, enforcing or taking any action in any manner to enforce the Emergency Regulations.

Pending a hearing on a Preliminary Injunction, Plaintiffs hereby apply for, and submit that the interests of justice require that, a Temporary Restraining Order issue restraining and enjoining Defendants CALIFORNIA DEPARTMENT OF PUBLIC HEALTH and TOMÁS J. ARAGÓN, M.D., Dr. P.H., and DOES 1-50 (collectively, "DEFENDANTS"); from implementing, enacting,

enforcing or taking any action in any manner to enforce the Emergency Regulations and request an Order to Show Cause issue to show why a preliminary injunction should not issue.

A temporary restraining order should be granted and an order to show cause should be set because good cause exists as Plaintiffs are likely to prevail on the merits and will suffer irreparable injury should the TRO and OSC not issue.

Notice of Application

(Cal. Rules of Court, Rules 3.1203, 3.1204)

As set forth in the accompanying Declaration of Andrew M. Jones, notice was provided via Department's service inbox on October __ 2024 at __. On September 27, 2024, counsel for Department, Gregory Cribbs contacted Plaintiffs' counsel and informed him that Department is authorized to accept service for TOMAS J. ARAGON, M.D., Dr. P.H. A courtesy copy of the ex parte notice was transmitted to Mr. Cribbs. (Jones Decl., ¶ 14.) A true and correct copy of the ex parte notice is attached hereto as exhibit X. (Jones Decl., ¶ 14.) Counsel for the DEFENDANTS will appear remotely at the hearing to oppose this Application. (Jones Decl., ¶ 16.) Notice of this ex parte application identified that the hearing would take place department 82 pursuant to Los Angeles County Local Rule 2.8.

Documents Supporting the Application

This Application is based upon this Notice of *Ex Parte* Application and Application; the accompanying Memorandum of Points and Authorities, the Request for Judicial Notice, and the Declarations of Andrew M. Jones, Pete Meachum, President of USHRT, Case Mandel, CEO of Boldt Runners, Christopher Boucher, CEO of JuiceTiva; Jonathan Black, CEO of Cheech and Chong; Chad Paydo, CEO of SunFlora; all other pleadings and papers on file in this action; and such evidence and oral argument as may be presented at or before the time of the hearing on this Application.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

COMES NOW Plaintiffs U.S. HEMP ROUNDTABLE, INC., CHEECH AND CHONG GLOBAL HOLDINGS, INC. ("Cheech and Chong"), JUICETIVA, INC. ("JuiceTiva"), BLAZE LIFE LLC ("Blaze Life"), BOLDT RUNNERS CORPORATION ("Boldt Runners"), LUCKY TO BE BEVERAGE CO. ("Lucky To Be"), and SUNFLORA, INC. ("SunFlora") (collectively, "Plaintiffs"), by and through their counsel, who seek a temporary restraining order and an order to show cause re: preliminary injunction restraining and enjoining Defendants from implementing, enacting, enforcing or taking any action in any manner to enforce the Emergency Regulations regarding Serving Size, Age, and Intoxicating Cannabinoids for Industrial Hemp; DPH-24-005E (the "Emergency Regulations").

Plaintiffs seek a Preliminary Injunction restraining and enjoining Defendants CALIFORNIA DEPARTMENT OF PUBLIC HEALTH and TOMÁS J. ARAGÓN, M.D., Dr. P.H., and DOES 1-50 (collectively, "DEFENDANTS") from implementing, enacting, enforcing or taking any action in any manner to enforce the Emergency Regulations.

Pending a hearing on a Preliminary Injunction, Plaintiffs hereby apply for, and submit that the interests of justice require that, a Temporary Restraining Order issue restraining and enjoining DEFENDANTS from implementing, enacting, enforcing or taking any action in any manner to enforce the Emergency Regulations and request an Order to Show Cause issue to show why a preliminary injunction should not issue.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On September 13, 2024, the California Department of Public Health issued sweeping emergency regulations entitled, "Notice of Proposed Emergency Regulatory Action; Serving Size, Age, and Intoxicating Cannabinoids for Industrial Hemp; DPH-24-005E" concerning hemp products which took effect on September 23, 2024 ("Emergency Regulations.") **Exhibit A**. Plaintiffs seek to challenge these Emergency Regulations on numerous grounds, including that they are unconstitutional:

1. Hemp legislation in California was introduced in 2021 by AB 45 which eventually was codified in the California Health & Safety Code.[1] At the core of the current Emergency Regulations is a provision that goes far beyond the limits in the California Health and Safety Code **to ban *all* hemp products unless they contain no "detectable levels of THC."** This draconian regulation alone will essentially devastate an emerging industry that consists largely of small business owners. It's akin to requiring candy to stop containing sugar … starting tomorrow.

2. The second draconian provision is a **change in the statutory provisions of what it means to be a hemp product and an illegal distinction between intoxicating and non-intoxicating cannabinoids.** The Emergency Regulations contradict express provisions of the HSC §§ 11018.5 and federal law 7 U.S.C. § 16390(1) which set out statutory requirements of hemp products, that may not be modified by regulations.

3. The Emergency Regulations create **a new age restriction of 21 years for the** purchase and consumption of all industrial hemp extract final form products and hemp final form food products intended for human consumption. While Plaintiffs are not opposed to age restrictions, they do oppose the issuance of regulations on an emergency basis.

The Department had nearly three years since 2021 to address the issues in these Emergency Regulations, which were fully known to the Department and the California Legislature. As recently as

[1] References to sections of the California Health & Safety Code herein are sometimes abbreviated as "HSC §____" for brevity purposes.

a few weeks ago, the California Legislature refused to pass AB 2223 on August 31, 2024, which would have enacted similar provisions. To bypass the legislature, and to reach such issues outside the constraints of the regular rulemaking process, the Department issued the Emergency Regulations. The Department's inaction over the last three years hardly serves as a sufficient basis for declaring a sudden emergency and circumventing the meticulous procedures of regular rulemaking.

Plaintiffs, a trade organization and several small businesses, bring this action to seek relief from this Court to avert the decimation of this sector of the California economy because, whatever the merits of the general issues addressed by these emergency regulations, the Department has acted entirely outside the boundaries of California's applicable law to adopt and issue them. Plaintiffs and their members will suffer losses in the millions of dollars related to existing products, pending manufacturing, and future sales of hemp and hemp products that legally contained THC, as per existing California and federal law, but have now been banned overnight by the Emergency Regulations.

If allowed to remain in effect, the Emergency Regulations will eliminate nearly every ingestible hemp product currently for sale in California, including the vast majority of non-intoxicating products, and even though some products subject to the Emergency Regulations are not sold in California. Many small businesses will have to close operations immediately with millions in losses. Relief is thus warranted because the Emergency Regulations are substantially unlawful and have in any event been adopted by drastically unlawful means.

The manufacture, distribution, and commercial sale of hemp and hemp products in California is not new, but rather has been occurring legally for years. There is a long and well-documented history of regulating hemp and hemp products in California, under both federal and state regulatory regimes, such that hemp products may be manufactured, distributed, and sold at retail. That is why it is critical that the Emergency Regulations be overruled.

II. SUMMARY OF RELEVANT FACTS

A. Plaintiffs

Plaintiff U.S. Hemp Roundtable, Inc. ("USHRT") is a Kentucky non-profit corporation. USHRT is the nation's leading business advocacy organization for the hemp and hemp products'

industries. USHRT's members conduct activities at all stages of the seed-to-sale hemp supply chain. Of USHRT's at least eighty-two (82) members, over three dozen of them manufacture, warehouse, distribute, offer, advertise, market, and/or sell, in California, products that contain detectable levels of hemp-derived tetrahydrocannabinol ("THC"). Plaintiffs Cheech and Chong, JuiceTiva, Blaze Life, Boldt Runners, Lucky to Be and SunFlora all either manufacture, distribute or sell hemp-derived products in California in compliance with existing federal and state laws governing hemp and hemp products.

B. The Emergency Regulations

On Friday, September 13, 2024, the California Department of Public Health ("Department") posted the "Notice of Proposed Emergency Regulatory Action; Serving Size, Age, and Intoxicating Cannabinoids for Industrial Hemp; DPH-24-005E," the accompanying "Finding of Emergency," and the Proposed Emergency Regulations (collectively, "Emergency Regulations") on the Office of Administrative Law's ("OAL") website. Request for Judicial Notice ("RJN"), Exhibit A. The Emergency Regulations went into effect on September 23, 2024. The Emergency Regulations amend and/or modify California Code of Regulations, Title 17, Sections 23000, 23005, 23010, 23015, 23100. The OAL Law File No. is Z-2024-0913-02E.

The text of the Emergency Regulations change the law in **three regards** by adding new regulations to the California Code of Regulations ("CCR"), Title 17, Div. 1, Chap. 5, Subchap. 2.6, Industrial Hemp, in the following areas: (i) increasing the age restriction to 21 years; (ii) expanding the definition of THC; and (iii) making significant changes in the serving sizes and packaging of hemp products. RJN, Exhibit A. Each of these items is analyzed in detail below.

III. LEGAL ANALYSIS

The primary statute authorizing injunctive relief in California is Code Civ. Proc. § 526. Code Civ. Proc. §§ 527 and 528 authorize preliminary injunctions and temporary restraining orders. A provisional injunction is made pursuant to Civ. Code § 3420, and a permanent or final injunction is made pursuant to Civil Code §§ 3420 and 3422.

A. A Temporary Restraining Order May Issue Where Great and Irreparable Injury Will Result To the Applicant Unless the Offending Conduct is

Immediately Restrained

A TRO may issue when "[i]t appears from the facts shown by affidavit or by the verified complaint that great or irreparable injury will result to the applicant before the matter can be heard on notice…" The Court evaluates two interrelated factors when deciding whether or not to issue a temporary restraining order. The first is likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the restraining order is denied, as compared to the harm that the defendant is likely to suffer if the order is issued. *Church of Christ in Hollywood v. Superior Court* (2002) 99 Cal.App.4th 1244, 1251, Code Civ. Proc. § 527(c)(1). One of these two factors may be accorded greater weight than the other depending on the applicant's showing. *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 447.

A TRO is distinguishable from a preliminary injunction in the following respects: It may be issued ex parte; a bond, though commonly required, is not essential; and it is of short duration, normally expiring at the time of the hearing on the preliminary injunction. *Chico Feminist Women's Health Center v. Scully* (1989) 208 Cal.App.3d 230, 237. The granting or denial of a temporary restraining order is discretionary with the trial judge and amounts to a mere preliminary or interlocutory order to keep the subject of the litigation in status quo pending determination of the action on the merits. *Gray v. Bybee* (1943) Cal.App.2d 564, 571.

B. An Order to Show Cause Re: Preliminary Injunction Should Also Issue

"A party requesting a preliminary injunction may give notice of the request to the opposing or responding party either by serving a noticed motion under Code of Civil Procedure section 1005 or by obtaining and serving an order to show cause ("OSC"). An OSC must be used when a temporary restraining order is sought, or if the party against whom the preliminary injunction is sought has not appeared in the action. If the responding party has not appeared, the OSC must be served in the same manner as a summons and complaint." CRC, Rule 3.1150(a). "If an application is made in an existing case, the moving party must request that the court file be made available to the judge hearing the application." CRC, Rule 31150(b).

Plaintiffs request that the instant TRO be issued based upon the evidence presented herein and the Verified Petition on file herein. Plaintiffs further request a full hearing on a Preliminary Injunction

for the same reasons and under the same authorities set forth herein, and request that an Order to Show Cause be issued along with the TRO to afford Defendants the opportunity to show why they should not be restrained and enjoined from implementing, enacting, enforcing or taking any action in any manner to enforce the Emergency Regulations.

A consideration of harm includes the inadequacy of other remedies, including damages, and the degree of irreparable injury the denial of the injunction would cause. *Intel Corp. v. Hamidi* (2003) Cal.4th 1342, 1352. That harm is irreparable "[i]s simply another way of saying that pecuniary compensation would not afford adequate relief or that it would be extremely difficult to ascertain the amount that would afford adequate relief." *DVD Copy Control Ass'n, Inc. v. Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697, 722. A plaintiff must make a showing of significant irreparable injury when the defendant is a public agency of officer. *O'Connell v. Sup.Ct. (Valenzuela)* (2006) 141 Cal. App. 4th 1452, 1464. California has long recognized that curtailment of business operations constitutes irreparable injury. *McCammon v. City of Redwood City* (1957) 149 Cal.App.2d 421, 424.

C. A TRO And Order To Show Cause Should Issue Because Plaintiffs Are Likely To Succeed On The Merits And Will Suffer Irreparable Harm

If the Defendants are not restrained and enjoined from implementing, enacting, enforcing or taking any action in any manner to enforce the Emergency Regulations, Plaintiffs will suffer great and immediate irreparable harm. Plaintiffs will prevail on the merits for the reasons detailed below.

D. Plaintiffs Will Succeed On The Merits Because The Emergency Regulations Violate The Administrative Procedure Act

The Emergency Regulations violate the Administrative Procedures Act ("APA"), Government Code §§ 11340 *et seq*. (Title 2, Div. 3, Part 1, Chap. 3.5), as detailed below. The adoption of emergency regulations is subject only to the provisions of 11346.1, 11349.5 and 11349.6. Gov. Code § 11346.1. Section 11346.1(a)(2) specifies that the Department must circulate a "notice" of the proposed emergency action that includes the "finding of emergency." *Id.* §11346.1(a)(2)(A) and (B).

If the Department makes a "finding" that the regulation is necessary to address an emergency, the regulation may be adopted as an emergency regulation. *Id.*§ 11346.1(b). Any finding of an emergency shall include specific facts demonstrating the existence of an emergency, by substantial

evidence, and information required by Section 11346.5(a)(2)-(6). *Id.* § 11346.1(b)(2). The findings shall also identify each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies. *Id.* § 11346.1(b)(2). A finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, shall not be adequate. *Id.* § 11346.1(b)(2). If the emergency existed and was known by the Department in sufficient time to have been addressed through nonemergency regulations, the finding of emergency shall include facts explaining the failure to address the situation through nonemergency regulations. *Id.* §11346.1(b)(2).

Any interested person may obtain a judicial declaration as to the validity of a regulation by an action for declaratory relief. The emergency regulation may be declared invalid if the finding of emergency does not constitute an emergency. *Id.* §§ 11350(a), 11346.1. Emergency regulations can be challenged on procedural and substantive grounds. *Id.* § 11350(a). An emergency regulation must be deemed invalid if it is not supported by, or contradicts, substantial evidence in the record. *Ibid.*

Here, the most profound defect of the Emergency Regulations is that the Department no longer has the authority to issue them in the first place under § 110065. The Emergency Regulations are unsupportable in the first instance because they constitute ultra vires acts.

1. Plaintiffs Will Prevail on the Merits Because the Department Already Enacted Initial, and Initial Emergency, Regulations in 2021

HSC § 110065 permits the Department to implement *initial emergency* regulations under the APA's emergency rulemaking process (HSC § 110065(b)(1)), as well as *initial regulations* that are "exempt from the [APA] except that the department shall post the proposed regulations on its internet website for public comment for thirty days" (HSC § 110065(c)).

The Department enacted *initial emergency* regulations and *initial regulations* on April 20, 2022. These *initial emergency* regulations and *initial regulations* did not contain the age restriction or THC serving or package restrictions being proposed in the current Emergency Regulations. Pursuant to section 110065, the initial emergency regulations were readopted as emergency regulations and then permanently adopted as a regular rulemaking. 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. *Id.* § 110065 (b), (c). The Department must follow the regular rulemaking process. *Id.* § 110065(a).

2. Plaintiffs Will Prevail on the Merits Because the Emergency Regulations' "Deemed Emergency" Clause Does Not Apply

California explicitly legalized the manufacture, distribution and sale of industrial hemp products, including as food, with the enactment of AB 45. AB 45 authorized the Department to "adopt emergency regulations to implement [regulations for hemp under Health and Safety Code Division 104] and "deemed an emergency" for the Department's adoption of certain regulations under AB 45. However, AB 45 only "deemed an emergency" for "the ***initial*** adoption of emergency regulations and the ***readoption*** of emergency regulations authorized by [HSC § 110065]." 2021 Cal. Legis. Serv. Ch. 576 (A.B. 45) (amending HSC § 110065(b)(3) (emphasis added). In all other respects, [t]he regulations shall be adopted by the [D]epartment in the manner prescribed by [California's Administrative Procedure Act]," except for limited exceptions for initial, non-emergency regulations that do not apply here. HSC § 110065(a),(c).

Here, Defendants cannot rely on AB 45's "deemed emergency" clause because the clause does not apply. First, AB 45 only "deemed an emergency" for emergency regulations "authorized by [HSC § 110065]." HSC § 110065(b)(3). Nothing in Section 110065, or in AB 45 generally, authorizes the Department to implement a "no detectable amount of THC" standard for final form hemp food products, as the Emergency Regulations do here. It is self-evident that AB 45 would not authorize the Department to prohibit hemp food products with any detectable amount of THC because AB 45 explicitly permits hemp products, including as food, with up to 0.3% delta-9 THC on a dry weight basis. *See* HSC § 11018.5(a) (using the 2018 Farm Bill's definition for "hemp"). The Department having the authority to entirely prohibit THC-containing hemp food products is counterintuitive because it would allow the Department to defeat the Legislature's purpose behind AB 45—which is to legalize all hemp products with up to 0.3% delta-9 THC. Therefore, the Emergency Regulations' "no detectable amount of THC" standard is not authorized under HSC § 110065, is not protected under AB 45's "deemed emergency" clause, and must follow the

Administrative Procedure Act's regular rulemaking process.

Second, even if the "deemed emergency" clause applies, the Emergency Regulations violate AB 45's mandate that all "regulations [adopted under AB 45] conform with those adopted under the federal act . . ." HSC § 110065(a). The term "federal act" is not defined, but, given AB 45's legalization of hemp products and HSC § 110065's reference to the U.S. Department of Agriculture (which regulates the production of hemp), the term presumably refers to the 2018 Farm Bill. As discussed below, the Emergency Regulations do not "conform" with the 2018 Farm Bill. The Emergency Regulations' prohibition of final form hemp food products that meet the 2018 Farm Bill's definition of "hemp" is directly contrary to federal law. Moreover, the 2018 Farm Bill does not restrict legal hemp products by age, does not impose serving size or packaging limits, and does not distinguish between intoxicating and non-intoxicating cannabinoids. In fact, with respect to the latter, the Ninth Circuit and Fourth Circuit have been clear that the 2018 Farm Bill's "broad" and unambiguous definition of hemp "expressly applies to 'all' such downstream products so long as they do not cross the 0.3 percent delta-9 THC threshold," even to products that may contain intoxicating cannabinoids like delta-8 THC. *AK Futures LLC v. Boyd St. Distro, LLC*, 35 F.4th 682, 692 (9th Cir. 2022); *Anderson v. Diamondback Inv. Grp., LLC*, No. 23-1400, 2024 WL 4031401, at *17 (4th Cir. Sept. 4, 2024) (agreeing with the Ninth Circuit's interpretation in *AK Futures LLC*). The Emergency Regulations conflict with the 2018 Farm Bill in that they prohibit hemp products that are legal under the 2018 Farm Bill and determine a product's legality based on whether it contains any amount of any THC, even if the product does not exceed 0.3% delta-9 THC on a dry weight basis.

Third, as addressed above, there is no argument that the Emergency Regulations are the Department's "initial" emergency regulations under AB 45. The Department could have begun by including the Emergency Regulations as part of its initial sets of regulations under AB 45. *See* Merriam-Webster, "Initial," https://www.merriam-webster.com/dictionary/initial ("Initial" means " "placed at the beginning"); *Hernandez v. Department of Motor Vehicles*, (2020) 49 Cal.App.5th 928, 935 (the Court must look at the plain and common sense meaning).. The Department chose not. The Emergency Regulations are not the Department's "initial" regulations.

Additionally, Plaintiffs' interpretation of the sunset of the Department's power to issue emergency initial regulations is consistent with California law disfavoring a perpetual emergency. Even when the California Governor issues emergency regulations under the Emergency Powers Act. This awesome power is checked by the requirement that the Governor must terminate the state of emergency at the earliest possible date that conditions warrant. *640 Tenth, LP v. Newsom* (2022) 78 Cal.App.5th 840, 858. Government Code § 8629. The legislature may also terminate the emergency. *Id*. An emergency order is also subject to judicial review. See *Ghost Golf, Inc. v. Newsom* (2024) 102 Cal.App.5th 88, 105.

3. The Department Has Failed to Provide Specific Facts Demonstrating An Emergency And Need For Immediate Action

Even if the Department could theoretically utilize the emergency rulemaking process, it failed to even minimally satisfy the emergency rulemaking procedures detailed herein. The burden of demonstrating there is "substantial evidence" for the emergency rests with the Department. *California Med. Assn. v. Brian* (1973) 30 Cal.App.3d 637, 652; CCR, Tit. 1 § 50 (b)(3(B). In the case of a 'deemed emergency,' the emergency filing does not have to satisfy the strict statutory standard defining emergencies. The Rutter Guide's "Practice Pointer for Agencies" states: "If a statute simply calls for the adoption of emergency regulations, without expressly declaring that the situation is an emergency, agencies should take care to document that the situation is a true emergency as that term is defined in the APA." California Practice Guide, Administrative Law, Ch. 26-E, ¶ 26.171. The OAL shall not approve any emergency regulation that does not satisfy the requirements of Cal. Code Regs. Tit. 1, § 50(b)(3)(B). Cal. Code Regs. Tit. 1, § 50(c). Gov. Code § 11349.6(b).

"[T]he wording of [Gov. Code §11346.1] was changed . . . to eliminate abuses by administrative agencies of the power to make emergency regulations by expanding the scope of the judicial inquiry. The wording was changed to 'the facts recited in the statement' . . . because the Legislature intended the courts to have the power to judge the facts claimed by the agency as well as the statement of emergency." *Brian*, 30 Cal.App.3d at 652. *"[T]he facts stated in the declaration of an emergency are not conclusive on the courts and thus the court [does] not err in receiving evidence tending to impeach the facts recited in the declaration." Ibid.*

Here, Defendants have relied solely on generic, conclusory statements. This is wholly inadequate. "The finding of a statement of facts constitution an emergency must be more than mere 'statements of motivation' for the enactment and provide an adequate basis of judicial review. Even if the Emergency Regulations are "sound" policy, the Department's conclusory statements in its finding of an emergency "do not reflect a crisis situation." *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 941-42. In fact, nothing in the Emergency Regulations compels or justifies the view that such action would seriously affect public peace, health and safety or general welfare, especially with respect to each of the components of the Emergency Regulations." *Ibid*. (invalidating emergency declaration by California State colleges which contained merely generic statements.)

4. There is no Emergency for Rulemaking on Detectable Limits of THC in Hemp or to Expand the Definition of Hemp

When it comes to the proposed ban on hemp final form food products that contain THC, and the proposed serving and package limits, the Department offers no case for an emergency. Its Findings of Emergency discuss only the proposed age requirement and list of intoxicating cannabinoids. There is no discussion of the emergency need for maximum serving or package limits for hemp final form food products, or of the emergency need to ban the manufacture, warehousing, distribution, advertising, or sale of products that are not intended for sale to California consumers. The Department has wholly failed to meet Cal. Gov. Code section 11346.1's requirements as to the proposed serving or package limits.

Additionally, the Emergency Regulations do not adequately describe the substantial deviations from existing federal law that would be effectuated. Gov. Code § 11346.5(3)(B). The Findings of Emergency refer to part of the 2018 Farm Bill's definition of "hemp," but it does not recite the definition in full. In addition to the partial definition, the document does not explain that the Emergency Regulations' broad expansion of the definition of "THC" to include 30 additional cannabinoids directly conflicts with the 2018 Farm Bill's determination of hemp based only on its concentration of 0.3 percent of delta-9 THC on a dry weight basis and not on the presence of any other cannabinoids. In other words, the Department has not addressed that the Emergency Regulations would prohibit a hemp final form food product that contains more than 0.3 percent delta-8 THC but that does not contain more than 0.3 percent delta-9 THC, when the same product is legally under and protected by the 2018 Farm Bill.

5. There is no Emergency for Rulemaking on Age Restrictions

Even with respect to the proposed age restriction, the Emergency Regulations fail to meet section 11346.1's requirements in at least two ways. First, the Department has not provided "the specific facts demonstrating the existence of an emergency and the need for immediate action" or "demonstrat[ed], by substantial evidence, the need for the proposed regulation." Cal. Gov. Code § 11346.1(b)(1). Rather, the Findings of Emergency summarily state that "[s]tudies show that use of these products can negatively impact cognitive functions, memory, and decision-making abilities in developing brains. In California and nationwide, there have been significant reports of hospitalizations among teenagers and young adults, highlighting the health risks for these age groups." The Department's conclusory statement is not a demonstration by "substantial evidence."

It is no secret that the legislature has chosen each of the past three legislative sessions since AB 45 became law to not enact an age restriction for hemp final form food products. Yet, just one week after the legislature ended its latest regular session without passing AB 2223, which would have implemented an age restriction, the Department publicly issued the Emergency Regulations, which were posted to the OAL's website one week later. The Department cannot infringe on legislative powers by end-running the legislature, and certainly cannot do so as a matter of "convenience, best interest, general public need, or speculation." Code § 11346.1(b)(2).

E. <u>Plaintiff Will Prevail on the Merits Because the Emergency Regulations Violate California Health & Safety Code & AB 45</u>

The Emergency Regulations must be stricken because they expressly contradict and violate provisions of the HSC enacted into law by AB 45 in 2021.

Section 110065 authorizes the Department to adopt regulations as follows:

> *110065. Adoption of regulations; law governing; conformance with federal regulations; emergency regulations; initial regulations regarding industrial hemp*
> (a) The department may adopt any regulations that it determines are necessary for the enforcement of this part. The regulations shall be adopted by the department in the manner prescribed by Chapter 3.5 (commencing with Section 11340) . . . of the Government Code. 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) [¶]
> (3) Notwithstanding any other law, the initial adoption of emergency regulations . . . shall be deemed an emergency and necessary for the immediate preservation of the public peace, health, safety, or general welfare. The initial emergency regulations . . . shall be each submitted to the Office of Administrative Law for filing with the Secretary of State and shall remain in effect for no more than 180 days, by which time final regulations shall be adopted.
>
> (c) Initial regulations regarding industrial hemp shall be exempt from the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of the Government Code), except that the department shall post the proposed regulations on its internet website for public comment for 30 days. The comments received shall be considered by the department and the final adopted regulations shall be filed with the Office of Administrative Law for publication in the California Code of Regulations. ***This exemption does not apply to regulations adopted pursuant to Section 111921.3 or 111922***. (Emphasis added.)

Thus, Section 110065 explicitly excludes age restrictions and serving sizes and packaging from the emergency regulations.

> *111921.3. Regulations imposing age requirement*
> The department may adopt regulations imposing an age requirement for the sale of certain industrial hemp products upon a finding of a threat to public health.
>
> *111922. Regulation of serving sizes, active cannabinoid concentration per serving size, number of servings per container, and other requirements; food and beverage to be prepackaged and shelf stable*
> (a) The department, through regulation, may determine maximum serving sizes for hemp-derived cannabinoids, hemp extract, and products derived therefrom, active cannabinoid concentration per serving size, the number of servings per container, and any other requirements for foods and beverages.
> (b) Food and beverages shall be prepackaged and shelf stable.

Section 110065 enables the Department to issue emergency regulations for the Sherman Law *only*. HSC §§ 109875 *et seq.* The definition of hemp is governed by the Controlled Substances Act, HSC § 11018.5(a). It does not authorize the Department, under the guise of emergency regulations, to alter and amend the substance of duly enacted legislation. Hence, Section 110065 cannot, under the guise of an emergency regulation, nullify provisions of another statute or modify the definitions set forth in the statute.

1. The Emergency Regulations Add New Age Restrictions that Have Not Been Adopted in the Health & Safety Code

First, the Emergency Regulations create a new regulation implementing an age restriction of 21 years for the purchase and consumption of all industrial hemp extract final form products and hemp final form food products intended for human consumption:

> *C.C.R. Section 23005. Age Requirement for Extract and Human Food*.: A person shall not offer or sell industrial hemp extract in its final form or industrial hemp final form food products intended for human consumption, including food, food additives, beverages, and dietary supplements, to a person under 21 years of age.

Unlike the Emergency Regulations, HSC § 111920 (g)(1) does not restrict hemp products in the form of food, food additives, beverages, or dietary supplements to persons 21 years or older. While HSC § 111921.3 authorized the Department to "adopt regulations imposing an age requirement for the sale of certain [] hemp products upon a finding of a threat to public health," the Department did not attempt to do so until its issuance of these Emergency Regulations three years after AB 45 became law in 2021.

While Plaintiffs agree there must be some age restrictions in place, the circumstances, including in particular the Department's failure to utilize the regular rulemaking process to enact appropriate age limit restrictions, prohibit the Department from capitalizing on its own inaction by resorting to the emergency rulemaking process.

2. The Emergency Regulations Expand the Definition of THC Significantly Altering What it Means To Be A Hemp Product

First, the Emergency Regulations add a new regulation expanding California's definition of "THC" to include thirty additional substances deemed intoxicating. *C.C.R. Section 23010.*

Second, the Emergency Regulations expand the definition of "THC" to include a list of 30 intoxicating cannabinoids. With this change, a hemp product is illegal if it contains THCs other than delta-9 THC. Again, as the Ninth Circuit and Fourth Circuit have held, the 2018 Farm Bill's "broad" and unambiguous definition of hemp, "expressly applies to 'all' such downstream products so long as they do not cross the 0.3 percent delta-9 THC threshold," even to products that may contain intoxicating cannabinoids like delta-9 THC. *AK Futures LLC*, 35 F.4th 682, 692; *Anderson*, 2024 WL 4031401 at *17.

3. The Emergency Regulations Impose Serving Sizes & Packaging Restrictions Contrary to the Health & Safety Code

Third, the Emergency Regulations create a brand new standard for hemp products in California, i.e., hemp products must now contain *"no detectable levels of total THC."* This new standard essentially bans the manufacture, warehousing, distribution, offer, advertisement, marketing, or sale of hemp products in California that contain any "detectable levels of THC" which applies to the vast majority of hemp products in California.

> *C.C.R. Section 23100. Serving and Package Requirements.*
>
> (a) An industrial hemp final form food product intended for human consumption including food, food additives, beverages, and dietary supplements shall have the following:
> (1) Each serving in a package shall have ***no detectable amount of total THC***, and
> (2) Each package shall have no more than five servings, and
> (3) The serving and package sizes shall be determined using the same federal standards as non-industrial hemp food products unless specified in this subchapter or Part 5 of Division 104 of the Health and Safety Code.
> (b) An independent testing laboratory shall calculate and establish the limit of detection for all analytes in accordance with section 15731 of Title 4 of the California Code of Regulation as part of the chemical method verification or analysis.
> (c) A manufacturer of industrial hemp final form food product shall provide documentation that includes a certificate of analysis from an independent testing laboratory to confirm the amount of total THC in the final form food product does not exceed the total THC per serving size limits as set forth in this subchapter.
> (d) A person shall not manufacture, warehouse, distribute, offer, advertise, market, or sell industrial hemp final form 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.

C.C.R. Section 23100, emphasis added.

Related to this new standard, the Emergency Regulations add new definitions to clarify "no detectable amount of THC":

> *Section 23000. Definitions.*
> (a) For the purposes of this subchapter, the following definitions apply regarding industrial hemp:
> (1) "Detectable" means any amount of analyte, subject to the limit of detection.
> (2) "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.

Here, HSC § 111922 does not impose serving or package requirements for hemp products in the form of food, food additives, beverages, or dietary supplements. Nonetheless, the Emergency Regulations impose such restrictions, once again circumventing the regular rulemaking process in doing so.

The Emergency Regulations on serving sizes that require "no detectable" levels of THC in final form food products violates the provisions of the HSC, which have never adopted such a requirement or the elimination of detectable levels. HSC § 11018.5(a). These Emergency Regulations also violate Federal law which expressly permits hemp and hemp products to contain up to 0.3% delta-9 THC on a dry weight basis. 7 U.S.C. § 16390(1).

On the contrary, the HSC § 11018.5's definition of "hemp" expressly permits 0.3% THC in hemp products. Federal law also permits up to 0.3% delta-9 THC on a dry weight basis in hemp products. 7 U.S.C. § 16390(1). Specifically, the *Uniform Controlled Substances Act*, Div. 10, HSC § 11018.5(a) defines hemp as follows:

> (a) "*Industrial hemp*" or "*hemp*" means an 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***. Emphasis added.

The AB 45's definition of "*hemp product*" is now codified at HSC § 111920(g)(1) in Div. 104, Part 5, Chap. 9 of the *Sherman Food, Drug, and Cosmetic Law* ("Sherman Law") as follows:

> (g)(1) "*Industrial hemp product*" or "*hemp product*" means 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.
> (ii) "Animal" does not include livestock or a food animal as defined in Section 4825.1 of the Business and Professions Code.
> (iii) Does not include THC isolate as an ingredient.

"Final form product" is a product intended for consumer use to be sold at a retail premise. HSC § 111920(c).

The AB 45's definition of THC is at HSC § 111920(l):

> (l) "*THC*" or "*THC or comparable cannabinoid*" means any of the following:
> (1) Tetrahydrocannabinolic acid.
> (2) Any tetrahydrocannabinol, including, but not limited to, Delta–8–tetrahydrocannabinol, Delta–9–tetrahydrocannabinol, and Delta–10–tetrahydrocannabinol, however derived, except that the department may exclude one or more isomers of tetrahydrocannabinol from this definition under subdivision (a) of Section 111921.7.
> (3) Any other cannabinoid, except cannabidiol, that the department determines, under subdivision (b) of Section 111921.7, to cause intoxication.

While HSC § 111922 authorizes the Department to, "through regulation, . . . determine maximum serving sizes for hemp-derived cannabinoids, hemp extract, and products derived therefrom, active cannabinoid concentration per serving size, the number of servings per container, and any other requirements for foods and beverages," the Department did not attempt to issue any such regulations for three years until now.

While the Department may cap THC levels in hemp products, it may not do so in a way that alters what is considered a hemp product by requiring hemp products to have a delta-9 tetrahydrocannabinol concentration of no more than 0.3 percent on a dry weight basis. HSC § 11018.5(a).

Also, it is important to note, HSC § 110065 gives the Department power (HSC § 111921.7) to issue emergency regulations for the Sherman Law *only*. HSC §§ 109875 *et seq.* The definition of hemp is governed by the Controlled Substances Act, HSC § 11018.5(a). Hence, Section 110065 cannot regulate provisions of another statute and illegally modify definitions.

HSC § 111921.7 gives the Department certain powers with respect to the inclusion of other cannabinoids in the definition of THC. However, these powers do not authorize the Department to alter the definition of hemp entirely.

The Department is further authorized to regulate and cap THC concentration by HSC section 111925(a)(3) and (b).

However, none of these powers permit the Department to alter existing provisions of the HSC or federal law, via emergency rulemaking, and without adequate input from hemp businesses that will be

irreparably harmed by the Emergency Regulations.

The Ninth Circuit and Fourth Circuit have been clear that "the only statutory metric for distinguishing" where a product is "legal hemp" under the 2018 Farm Bill- and not controlled as marijuana- is the delta-9 THC concentration level. *AK Futures LLC,* 35 F.4th at 692.

A statute or regulation that uses a different metric, as the Emergency Regulations do here, impermissibly alters the determination of whether a product is "hemp" under the 2018 Farm Bill. *See California Medical Assn. v. Brian* (1973) 30 Cal.App.3d 637, 642. (Administrative regulations that violate acts of the Legislature are void and no protestations that they are merely an exercise of administrative discretion can sanctify them. They must conform to the legislative will if we are to preserve an orderly system of government.); *Ocean Park Associates v. Santa Monica Rent Control Bd.* (2004) 114 Cal.App.4th 1050, 1064 ("[I]t is fundamental in our law that an administrative agency may not, under the guise of its rule-making power, abridge or enlarge its authority or act beyond the powers given to it by the statute which is the source of its power…Administrative regulations that alter or amend the statute or enlarge or impair its scope are void…").

4. The Emergency Regulations Illegally Restrict Hemp Dietary Supplements

HSC § 110611 expressly legalizes dietary supplement, food, beverage, cosmetic, and pet food products that contain hemp or hemp derived cannabinoids by mandating, "[A] dietary supplement, food, beverage, cosmetic, or pet food is not adulterated by the inclusion of industrial hemp or cannabinoids, extracts, or derivatives from industrial hemp if those substances meet specified requirements[.]" HSC § 110611.

HSC § 110611 "prohibit[s] restrictions on the sale of dietary supplements, food, beverages, cosmetics, or pet food that include industrial hemp or cannabinoids, extracts, or derivatives from industrial hemp based solely on the inclusion of those substances." HSC § 110611. The Emergency Regulations illegally amend and modify HSC provisions by criminalizing final form food products based solely on their containing "any detectable amount of any THC." In other words, the Emergency Regulations restrict the sale of final form food products, including beverages in a manner that is prohibited by HSC § 110611.

5. The Emergency Regulations Illegally Distinguish Between Intoxicating and

Non-Intoxicating Cannabinoids

HSC provisions do not distinguish between intoxicating cannabinoids and non-intoxicating cannabinoids. To the extent such a distinction is appropriate, the Department has again done nothing on this topic for the past three years. Nonetheless, the Emergency Regulations adopt precisely such a distinction, which if appropriate could have easily been considered under the regular rulemaking process during the last three years.

Neither federal law nor AB 45 distinguishes between intoxicating hemp-derived cannabinoids and non-intoxicating hemp-derived cannabinoids. See generally 2018 Farm Bill, AB 45. In fact, both the 2018 Farm Bill and AB 45—using identical definitions—define "hemp" to include the "plant Cannabis sativa L. and any part of that plant, including . . . all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers," whether or not the cannabinoid is intoxicating. Therefore, the Emergency Regulations illegally distinguish between intoxicating hemp-derived cannabinoids and non-intoxicating hemp-derived cannabinoids by criminalizing final form food products that contain "any detectable amount of any THC" and expanding California law's definition of "THC" to include "any metabolites, derivatives, salts, isomers, and any salt or acid of an isomer of" any of the 30 substances listed in C.C.R. Section 23010 as "intoxicating cannabinoids."

6. The Emergency Regulations Illegally Prohibit the Manufacture of Hemp

The Health & Safety Code does not prohibit the manufacture, warehousing, distribution, offer, advertising, marketing, or sale of hemp products in the form of food, food additives, beverages, and dietary supplements based on a detectable level of total THC. *See* AB 45, Health & Safety Code, *generally*. *No provision of AB 45 contemplated such a sweeping regulation that, in its effect, eliminates such activities*. Yet, that is exactly what the Emergency Regulations do.

F. <u>Plaintiffs Are Likely To Succeed On The Merits Because The Legislature Consistently Declined to Enact Age Restrictions and THC Limits</u>

Following AB 45's enactment, legislative efforts to impose age restrictions and THC limits for intoxicating hemp-derived THC products have failed. See Jones Decl. Paragraph 5, Exhibit 5.

Specifically, in February 2023, in the wake of intoxicating hemp-derived THC products being sold in California, Assemblywoman Cecilia Aguiar-Curry introduced AB 420. The bill would have prohibited the manufacture, distribution, or sale of a hemp product that contains any non-naturally

occurring cannabinoid and set a 0.3% total THC limit for hemp products. ***The legislature declined to pass AB 420.***

A year later, in February 2024, Assemblywoman Aguiar-Curry introduced AB 2223. Largely similar to AB 420, AB 2223 would have excluded synthetically derived cannabinoids from the definition of "hemp," set a 0.3% total THC limit for hemp products, and imposed a five-serving-per-package limit for hemp food and beverage products in final form.

Amendments to AB 2223 would have limited all hemp products, not just food and beverage products, to one milligram of total THC per package and 0.25 milligrams of THC per serving. While USHRT opposed the amounts of the per-serving and per-package limits, it engaged with Assemblywoman Aguiar-Curry to achieve a compromise but was unsuccessful.

Later in the legislative session, Governor Newsom's administration proposed amendments to AB 2223 that are nearly identical to the Emergency Regulations. The amendments would have prohibited all hemp products from containing any traceable amount of THC, despite California's defining "hemp" based on its 0.3% or less delta-9 THC concentration on a dry weight basis. Unsurprisingly, the administration's amendments torpedoed AB 2223's legislative prospects. Again, the Legislature declined to pass the AB 2223.

On August 31, 2024, the legislature ended its latest regular session without passing AB 2223, thereby choosing not to enact the administration's proposed prohibition against hemp products that contain any traceable amount of THC.

Despite having known for years that hemp-derived THC products are being manufactured, distributed, and sold in California, the Department has wholly failed to do anything about it.

Now the Department, part of Governor Newsom's Executive Branch, is trying to illegally end-run the legislature's decision to not enact AB 420 and AB 2223 that would have set age restrictions and/or THC limits for some hemp products. This must be stopped.

G. Plaintiffs Are Likely To Succeed On The Merits Because The Emergency Regulations Are Invalid Under the 2018 Federal Farm Bill

In December 20, 2018, President Donald Trump signed into law the Agricultural Improvement Act of 2018 ("2018 Farm Bill"). The 2018 Farm Bill permanently removed hemp and THCs in hemp

from the federal Controlled Substances Act, leaving no role for the U.S. Drug Enforcement Administration ("DEA") to enforce against lawful hemp or hemp products.

The 2018 Farm Bill expanded the definition of "hemp" by defining it as the "plant Cannabis sativa L. and any part of that plant, including the seeds thereof *and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not,* with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C. § 16390(1) (emphasis added). Thus, the 2018 Farm Bill's expansion broadly redefined "hemp" as including ***all*** products derived from hemp, so long as their delta-9 THC concentration does not exceed 0.3% on a dry weight basis.

In general, as courts throughout the country have affirmed, the only relevant statutory metric in analyzing whether a product is to be considered hemp or under the 2018 Farm Bill is its concentration of delta-9 THC on a dry weight basis. ***If the product has 0.3% delta-9 THC or less on a dry weight basis, then it is hemp and is legal under the 2018 Farm Bill.*** If the product contains more than 0.3 percent Delta-9 THC, then it is not hemp.

The Conference Report for the 2018 Farm Bill made clear that Congress intended to preclude a state from adopting a more restrictive definition of hemp: "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." Conference Report for Agricultural Improvement Act of 2018, p. 738 (emphasis added).

The Final Rule promulgated by the U.S. Department of Agriculture ("USDA") to implement the 2018 Farm Bill clarifies that, while the 2018 Farm Bill preserved the authority of states to regulate the act of producing hemp if they chose to do so, *states may not alter the definition of "hemp" or regulate in a manner that reaches beyond production. In other words, the 2018 Farm Bill permits states to regulate the production, i.e., cultivation, of hemp if they chose to do so, but nothing more*.

Significantly, the 2018 Farm Bill expressly prohibits states from interfering with or impeding the transportation or shipment of hemp and hemp products produced in accordance with the 2018 Farm Bill:

SEC. 10114. INTERSTATE COMMERCE.

> (a) Rule of Construction. Nothing in this title or an amendment made by this title prohibits the interstate commerce of hemp (as defined in section 297 A of the Agricultural Marketing Act of 1946 (as added by section 10113)) or hemp products.
> Transportation of Hemp and Hemp Products. No State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with subtitle G of the Agricultural Marketing Act of 1946 (as added by section 10113) through the State or the territory of the Indian Tribe, as applicable.

This explicit protection for hemp and hemp products in interstate commerce would be rendered meaningless if states were permitted to criminalize hemp or hemp products by, for example, altering their definition of "hemp" in a manner that conflicts with the 2018 Farm Bill's definition and would frustrate Congress's overarching goal of the 2018 Farm Bill to protect commerce involving hemp and hemp products and treat them once again like a commodity.

The General Counsel for the USDA authored a legal memorandum discussing the 2018 Farm Bill's prohibition on states restricting the transportation or shipment of hemp, concluding that any state law purporting to do so has been preempted by Congress. Declaration of Drew Jones, **Exhibit A**.

In short, the 2018 Farm Bill (1) broadly defined "hemp" as including all cannabinoids, extracts, and derivatives of the plant, whether growing or not; (2) legalized hemp and hemp products with a delta-9 THC concentration of not more than 0.3% on a dry weight basis; (3) did not prohibit any hemp product based on the manufacturing process used to manufacture it; and (4) mandated that no state or Indian tribe may prohibit the transportation or shipment of hemp and hemp products in interstate commerce.

Further, the 2018 Farm Bill prohibits states from interfering with interstate commerce involving the shipment or transportation of hemp or hemp products. See Section 10114 of 2018 Farm Bil; See Congressional Report for Agricultural Improvement Act of 2018, p. 738 ("While states and Indian tribes may limit the production and sale of hemp and hemp products within their borders, the Managers, in Sec. 10112, agree to not allow such states and Indian tribes to limit the transportation or shipment of hemp or hemp products through the state or Indian territory.") In this instance, interstate commerce is impeded because there is no exception for products that are manufactured in California but shipped or transported to other states for sale exclusively outside California.

H. Plaintiffs Are Likely To Succeed On The Merits Because The Emergency Regulations Are Void For Vagueness

The Emergency Regulations are void for vagueness. A law is determined to be void for vagueness whin it "either forbids or requires the doing of an act in terms so vague that men or common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926).

The Emergency Regulations' "no detectable amount of THC" standard begs an obvious question—what is detectable THC? The definitions of "detectable" and "limit of detection," which do not exist in AB 45, offer no help. "Detectable" means "any amount of analyte, subject to the limit of detection." "Limit of detection" means the lowest quantity of a substance or an analyte that can be readily distinguished from the absence of that substance within a specified confidence limit."

In Article 3, Section 23100, which relates to "Serving and Package Requirements," the Emergency Regulations state "an independent testing laboratory shall calculate and establish the limit of detection for all analytes in accordance with section 15731 of Title 4 of the California Code of Regulation as part of the chemical method verification or analysis. However, it is not clear whether the laboratory's limit of detection applies to industrial hemp final form products that are not manufactured in California. Section 17731 of Title 4 of the California Code of Regulation allows a laboratory to calculate a limit of detection using any one of three possible methods, including (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 (3) A method published by the United States Food and Drug Administration (FDA) or the United States Environmental Protection Agency (USEPA).

The Emergency Regulations do not specify which of the three methods a laboratory must use, meaning a person is left to guess how the limit of detection for his or her industrial hemp products will be calculated.

The Constitution provides no person is to be deprived of "life, liberty or property without due

process of law." U.S. Const., Amends. V, XIV, and Cal. Const., art. 1 Section 7. Under both constitutions, due process of law in this context requires two elements: a criminal statute must "be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt." *Williams v. Garcetti* (1993) 5 Cal.4th 561, 567. A party must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that the law is impermissibly in all of its applications. Stated differently, a statute is not void simply because there may be difficulty in determining whether some marginal or hypothetical act is covered by its language." *People v. Morgan* (2007) 24 Cal.4th 593, 605-06.

In this case, the vagueness of the Emergency Regulations reaches this standard. The Emergency Regulations fail to identify the prohibition around having a detectable amount of THC. The Emergency Regulations set forth measuring standards that are unclear. For example, if an individual or company that manufactures or sells industrial hemp is in possession of an item with THC which does not exceed the limit of detection under one method of Section 17731 but does exceed it under another method, is that a violation? Other jurisdictions have found that this sort of vague regulations void for vagueness. See *Bio Gen, LLC v. Sanders*, 690 F. Supp. 3d 927, 940 (E.D Ark. 2023) ("These terms are paired with, at best, fuzzy standards- and record no explicit statutory definition- making it next to impossible for the typical person to know what to do. If the person guesses wrong, the consequences are potential criminal punishment."). The Emergency Regulations have now forced this same dilemma upon California business owners and consumers. If one relies on the wrong method according to the authorities, the punishment could be up to one year in jail and a fine up to $1,000. See HSC §11350.

I. Plaintiffs Will Suffer Immediate And Irreparable Harm Due To The Emergency Regulations

Here, California industrial hemp businesses will not simply see their business curtailed, but many businesses stand to be destroyed completely by the Emergency Regulations. Excerpts of declarations from hemp industry leadership and industry participants below give some flavor to the immediate and devastating harm that the Emergency Regulations have caused.

1. USHRT

These misguided Emergency Regulations have brought the legalized hemp infused product market to a screeching halt in California. The end result will be horrendous to industry participants such as farmers, manufacturers, distributors, and retailers, who will suffer significant financial injury. Additional suffering will be felt by the California consumer, many who will now be forced into the unenviable choice of going without these beneficial products or purchasing inferior substitutes on the underground market. Declaration of Pete Meachum ("Meachum Decl.") ¶ 4.

The failure to follow the regular rulemaking process, including public notice and comment adds to the harm on the industry. It became illegal, essentially overnight, the manufacture, distribute or sell hemp-derived products that have been manufactured, distributed and sold in California since at least 2021, if not before. Meachum Decl. ¶ 5.

But the suddenness and immediate effectiveness of the Emergency Regulations made it extremely difficult, if not impossible, for Plaintiffs to mitigate the disruption and harm to their businesses. The Emergency Regulations do not contain a sell-through provision. As a practical matter, there was no time for companies to sell through their finished inventory or change or move their manufacturing processes, alter their product formulations or serving or packaging sizes, or reprint labels or packaging to achieve immediate compliance with the Emergency Regulations. *Id.* ¶ 7. . In essence, it was logistically impossible for the industry to come into immediate compliance due to the regulations being adopted on an alleged emergency basis. *Id.* ¶ 11.

2. JuiceTiva

Plaintiff JuiceTiva is a California corporation based in Santa Ysabel owned and operated by a husband and wife team of organic hemp farmers. JuiceTiva manufactures, distributes, and sells hemp juice powder food supplement products that contain hemp-derived tetrahydrocannabinolic acid and other hemp-derived cannabinoids. Declaration of Christopher Boucher ("Boucher Decl.") ¶ 2.

JuiceTiva's products contain detectable levels of THC, which were compliant with both federal and state law prior to the issuance of the Emergency Regulations. The imposition of these regulations has precluded JuiceTiva from immediately reformulating its manufacturing process. JuiceTiva will suffer millions of dollars in future orders and will render its existing inventory in the

pipeline worthless. Current construction of manufacturing facilities in impoverished rural farming communities are threatened. JuiceTiva will need to curtail farming and production jobs due to the anticipated reduction in sales orders. Thousands of acres being planted and forecasted for the next 2-years will be lost, causing more jobs and millions of dollars in investment to future dual-and tri-hemp crop production. *Id.* ¶ 4.

3. Boldt Runners

Boldt Runners manufactures, distributes, and sells tobacco-free and nicotine-free oral pouches that contain hemp-derived CBD and hemp-derived THC. Boldt Runners' line of non-intoxicating, hemp-derived CBD oral pouches are manufactured, distributed, and sold in California. Boldt Runner's line of intoxicating, hemp-derived THC oral pouches are manufactured in California but are exclusively sold to consumers outside California and are not sold to retailers, for sale in California. Despite Boldt Runners' oral pouches being labeled as a supplement, the Department authorized and issued Boldt Runners an Industrial Hemp Enrollment and Oversight license as an "IH Food" resistant. Accordingly, Boldt Runners' oral pouches are or may be subject to the so-called Emergency Regulations. Declaration of Case Mandel ("Mandel Decl.") ¶ 2.

Boldt Runners manufacturing processes have at all times complied with federal and state laws. The Emergency Regulations irreparably impact Boldt Runners' operations because, from a manufacturing, distribution, sale, advertisement or marketing perspective, they provide no opportunity to reformulate our product line or make other business-based adjustments to try to salvage manufacturing operations. The Emergency Regulation risks causing the company to lay off 25 employees in Northern California and to relocate the business out of State. It would cause tens of thousands of consumers who trust Boldt Runners to help them quit nicotine and tobacco pouches to be left without a viable option. This would lead to the loss of millions of dollars in revenue but most importantly one of the last viable businesses in Humboldt County, California. *Id*. ¶ 5.

4. Cheech and Chong

Cheech and Chong manufactures and sells beverage products that contain hemp-derived THC. Cheech and Chong manufactures, distributes, and sells its hemp-derived products in California. Declaration of Jonathan Black ("Black Decl.") ¶ 4. Cheech and Chong's product line

consists of full spectrum seltzer beverages (inclusive of delta-9), tinctures and edibles, some of which are dietary supplements. Cheech and Chong also sells other hemp and hemp infused products. *Id*. ¶ 5.

Cheech and Chong manufactures in California and sells hemp products and seltzer products that contain hemp-derived THC and other hemp-derived cannabinoids. Cheech and Chong sells its ingestible hemp products in California and other states through a distributorship network. *Id.* ¶ 6. Hemp and/or hemp infused products manufactured, distributed and sold by Cheech and Chong in California have been legally sold in California since it became legal to do so. *Id.* ¶ 7.

The Emergency Regulations calling for nondetectable limits of THC are so broad that it would wipe out entire hemp product lines, including broad spectrum products. *Id*. ¶ 8. Cheech and Chong will suffer irreparable injury including loss of goodwill and marketing efforts, that only came as a result of promoting what had been a safe product to trusting and loyal customers. The cost to Cheech and Chong will exceed $10 million. Cheech and Chong's employee base, will be adversely affected. This will lead to suspending any hiring in California and the layoff of employees. This will also adversely affect relations with distributors, and retail stores will also look to Cheech and Chong for immediate buybacks. *Id*. ¶ 12.

5. SunFlora

SunFlora is a franchisor of 18 franchises throughout California and is the sole source provider of hemp and hemp-infused products that SunFlora causes to be manufactured. Many of SunFlora's franchises are small businesses owned by women, and veterans, operating in smaller strip mall type locations. The franchisees generally do business under the name of "Your CBD Store" "Sunmed / Your CBD Store" or "Your CBD Store /Sunmed." Declaration of Chad Paydo ("Paydo Decl.") ¶ 4.

SunFlora's "Sunmed" product line consists of full spectrum seltzer beverages (inclusive of delta-9), tinctures and edibles, some of which are dietary supplements. Paydo Decl. ¶ 5. SunFlora also manufactures and sells ingestible gummies, tinctures, water solubles, and seltzer products that contain hemp-derived THC and other hemp-derived cannabinoids. SunFlora sells its ingestible hemp products in California through independently owned franchises. *Id*. ¶ 6.

In the event that the Emergency Regulations remain in effect, all 18 California franchisees will have to close operations immediately given. It is estimated that over 40 employees will be terminated. Further, approximately $2 million in inventory are subject to being pulled off the shelf. Typically, the average inventory product remains on the shelf for 3 to 6 months. SunFlora will be irreparably harmed by having to cease selling its products in California and the franchisees will have significant losses in inventory. *Id*. ¶ 10.

A balance of hardships favors Plaintiffs. Plaintiffs will suffer devastating effects due to the Emergency Regulations that will cost their businesses millions in revenue and ultimately lead to the destruction of an entire industry. Defendants' only loss is that they will have to consider whether to utilize the regular rulemaking process to implement these regulations. On balance, this factor leans heavily towards Plaintiffs. See *Coffee-Rich, Inc. v. Fielder* (1975) 48 Cal.App.3d 990, 999 ("a party who may suffer irreparable harm from enforcement of an unconstitutional statute may be granted injunctive relief against enforcement.")

For the reasons stated above, a Temporary Restraining Order should immediately issue to prevent further harm to Plaintiffs due to the Emergency Regulations.

IV. PLAINTIFFS HAVE COMPLIED WITH CALIFORNIA RULES OF COURT

As set forth in the accompanying Declaration of Andrew M. Jones ("Jones Decl."), ex parte notice was provided via the Department's service inbox, with a copy to counsel, at 4:28 p.m. on October 1, 2024. At 5:07 p.m., Gregory Cribbs, counsel for Defendants, informed our office that Defendants would appear remotely to oppose the application. See Jones Decl., ¶ 10, Ex. A & B.

V. CONCLUSION

For all the foregoing reasons, Plaintiffs request this Court grant the requested TRO and set and order to show cause hearing for Preliminary Injunction consistent with the Application.

DATED: October __, 2024

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