Date of Hearing: July 15, 2025

ASSEMBLY COMMITTEE ON JUDICIARY
Ash Kalra, Chair
SB 378 (Wiener) – As Amended July 9, 2025

SENATE VOTE: 37-0

SUBJECT: ONLINE MARKETPLACES: ILLICIT CANNABIS: REPORTING AND LIABILITY

KEY ISSUE: SHOULD ONLINE MARKETPLACES THAT FACILITATE THE SALE OF CANNABIS, CANNABIS PRODUCTS, AND HEMP PRODUCTS BE REQUIRED TO HAVE POLICIES AND PRACTICES TO ENSURE THAT SELLERS ON THEIR PLATFORMS ARE LICENSED; SHOULD CIVIL ENFORCEMENT MECHANISMS, INCLUDING STRICT LIABILITY, BE AVAILABLE TO BOTH FACILITATE ENFORCEMENT OF THE BILL'S REQUIREMENTS, AND COMPENSATE FOR HARMS CAUSED BY THE SALE OF THESE PRODUCTS?

SYNOPSIS

California's legal cannabis market is highly regulated, requiring state-issued licenses for operators at nearly every stage of the consumer cannabis supply chain, including the growth, distribution, and sales process. However, a black market of unlicensed operators continues to persist and successfully utilizes advertising technologies designed for the legal cannabis market to undercut legitimate operators and imperil the burgeoning legal cannabis trade. In order to minimize the online sale of unlawful products by unlicensed sellers, this bill, sponsored by United Food and Commercial Workers (UFCW) Western States Council, requires (among other things) that online marketplaces facilitating the sale of cannabis, cannabis products, and intoxicating hemp products have policies and practices to ensure that sellers on the marketplace are licensed.

The bill was referred to three policy committees in the Assembly. The Committee on Business & Professions, with primary jurisdiction over the subject of cannabis regulation, approved the bill by a vote of 16-0. The Committee on Privacy & Consumer Protection, with jurisdiction over the bill's consumer protection and technology provisions, recently approved the bill by a vote of 13-0. Relevant to the jurisdiction of this Committee, the bill authorizes a variety of civil enforcement mechanisms, including strict liability, against online marketplaces that violate these requirements and to compensate for the harms caused by the online sale of these products. Those issues are therefore the focus of this analysis.

The analysis reviews the bill's requirements and enforcement provisions, including its strict liability provision—and issues such as potential Section 230 immunity and potential First Amendment, Overbreadth, and Dormant Commerce Clause violations--raised by those requirements and provisions. It also discusses whether the bill's current liability provisions are fair to responsible online marketplaces that endeavor in good faith to follow the law. While no amendments will be taken in the Committee, the analysis recommends several ways that the author may wish to consider amending the bill as it moves forward.

SUMMARY: Requires online marketplaces that facilitate the sale of cannabis, cannabis products, and intoxicating hemp products to have policies and practices to ensure that sellers are licensed; and authorizes a variety of civil enforcement mechanisms, including strict liability, against online marketplaces that violate these requirements and to compensate for the harms caused by the online sale of these products. Specifically, **this bill**:

1) Defines "cannabis" and "cannabis product" as having the same meanings as defined in MAUCRSA.

2) Defines "online cannabis marketplace" as an internet website, online service, online application, or mobile application, including a social media platform, that does any of the following in California:

   a) Transmits or otherwise communicates between a third party and purchaser an offer for the sale of cannabis or a cannabis product that is accepted by the purchaser.

   b) Permits offers for the sale of cannabis or a cannabis product.

   c) Connects a seller of cannabis or cannabis products and a consumer.

3) Requires an online cannabis marketplace to address in its terms of service both of the following:

   a) Whether the marketplace permits advertisements from, or business information about, unlicensed sellers of cannabis or cannabis products to be viewed by Californians.

   b) Whether the online cannabis marketplace verifies that a seller of cannabis or cannabis products has a valid, unexpired license by consulting the license look-up function on the DCC's website before displaying, storing, or hosting the seller's advertisements or business information in a manner that is viewable to Californians.

4) Requires an online cannabis marketplace that does not verify that a seller of cannabis or cannabis products is licensed to display a clear and conspicuous graphic that a consumer must acknowledge and click through before viewing or engaging with the marketplace warning the consumer that the marketplace may be displaying, storing, or hosting unlicensed sellers of cannabis or cannabis products.

5) Subjects a marketplace that displays, stores, or hosts an advertisement from, or business information about, an unlicensed seller in violation of the warning graphic requirement to a civil penalty of up to $250,000 in an action brought by any person who identifies that the marketplace violated the requirement, in addition to reasonable attorneys' fees and costs.

6) Additionally provides that a marketplace that violates an injunction requiring compliance with the warning graphic requirement shall be prohibited from operating in California until a receiver appointed by the court issuing the injunction affirms that the marketplace is in compliance.

7) Provides that, in any action to enforce an injunction requiring compliance with the clear and conspicuous warning graphic requirement, the party obtaining enforcement shall be entitled to an award of twice its reasonable attorneys' fees and costs and a civil penalty of $500,000.

8) Requires an online cannabis marketplace to establish a clear and conspicuous mechanism for any person to report unlicensed sellers of cannabis or cannabis products to the online cannabis marketplace, which must feature functionality to do the following:

   a) Allow for an individual to upload a screenshot or provide basic identifying information, such as an account identifier or URL.

   b) Include a method for the marketplace to contact a reporting individual in writing, including a telephone number for purposes of sending text messages, an email address, or another reasonable electronic method of communication.

   c) Provide the reporting individual with written confirmation that the report has been received within 36 hours of receipt.

   d) Provide periodic written updates to the reporting individual as to the status of the marketplace's handling of the reported material, with the first written update provided as soon as reasonably feasible but no later than 14 days after either the date on which the written confirmation was provided or the date of the most recent written update.

   e) Require review of each report by a natural person.

   f) Issue a final written determination to the reporting individual, which shall state one of several outcomes, including confirmation that the seller's advertisements and business information have been blocked from being viewable on the marketplace.

9) Requires the final written determination to be provided to the reporting individual within 30 days of receiving the report, and provides that if the marketplace cannot comply with that timeline due to circumstances beyond the reasonable control of the marketplace, the marketplace shall comply no later than 60 days after the date on which the report was received and promptly provide written notice of the delay, no later than 48 hours from the time the marketplace knew the delay was likely to occur, to the reporting individual.

10) Subjects online cannabis marketplaces that violate any of the requirements of 8) – 9), above, to a civil penalty of up to $10,000 for each violation and for compensatory damages, punitive damages, and any civil remedies, penalties, or sanctions for harms caused by the marketplace's failure to comply, which damages shall be adjudicated and awarded apart from any harms attributable to the existence of the reported content alone.

11) Provides that in addition to other equitable relief, the court may order injunctive relief to obtain compliance and shall award reasonable attorney's fees and costs to the prevailing plaintiff.

12) Allows "a party" to bring a civil action to enforce the above reporting provisions.

13) Specifies that each day a marketplace is in violation of a requirement constitutes a separate violation.

14) Clarifies that the duties and obligations imposed by the bill are cumulative with any other duties or obligations imposed under other law and shall not be construed to relieve any party from any duties or obligations imposed under other law.

15) Defines "industrial hemp" as having the same meaning as defined in the Sherman Food, Drug, and Cosmetic Law.

16) Defines "inhalable hemp product" as any hemp product that can be used by inhalation, including, but not limited to, hemp flower, hemp prerolls, hemp vaping cartridges, liquids, or prefilled devices, hemp shatter, wax, budder, or other hemp derived concentrates that can be used for inhalation.

17) Defines "intoxicating hemp product" as meaning either of the following:

    a) An industrial hemp product whose THC concentration exceeds the amounts allowable under the Sherman Food, Drug, and Cosmetic Law or its implementing regulations.

    b) An inhalable hemp product with a detectable THC concentration.

18) Defines "online hemp marketplace" as an internet website, online service, online application, or mobile application, including a social media platform, that does any of the following in California:

    a) Transmits or otherwise communicates between a third party and purchaser an offer for the sale of an industrial hemp product that is accepted by the purchaser.

    b) Permits offers for the sale of an industrial hemp product.

    c) Connects a seller of an industrial hemp product and a consumer.

19) Applies substantially the same reporting mechanism requirements applicable to online cannabis marketplaces to online hemp marketplaces.

20) Prohibits both an online cannabis marketplace and an online hemp marketplace from engaging in paid online advertising related to unlicensed sellers of cannabis or cannabis products, intoxicating hemp products, or unregistered hemp products.

21) Allows "a party" to bring a civil action to enforce the above prohibition.

22) Specifies that each day a marketplace is in violation of a requirement constitutes a separate violation.

23) Provides that an online marketplace that violates the above prohibition and is a substantial factor in an unlawful transaction between a consumer and an unlicensed seller shall be strictly liable for damages caused to the consumer by the product to the same extent as a retailer would be liable for selling a defective product in the retailer's physical store.

24) Provides for the following enhanced damages that may be recovered by plaintiffs against an online marketplace for violations of the above prohibition:

    a) Two times the damages caused by the product if the online marketplace knew or should have known that the seller that offered the cannabis or cannabis product was not licensed.

b) Three times the damages suffered by a child caused by the product if the online marketplace knew or should have known at the time the marketplace facilitated the connection that the seller that offered the cannabis or cannabis product was not licensed.

25) Clarifies that the bill shall not be construed as applying to information or content displayed by a business on a computer or mobile device that is not a paid online advertisement.

EXISTING LAW:

1) Enacts the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) to provide for a comprehensive regulatory framework for the cultivation, distribution, transport, storage, manufacturing, processing, and sale of medicinal and adult-use cannabis. (Business and Professions Code (BPC) Sections 26000 *et seq.*)

2) Excludes industrial hemp from the definition of cannabis under MAUCRSA. (BPC Section 26001.)

3) Establishes the Department of Cannabis Control (DCC) within the Business, Consumer Services, and Housing Agency for purposes of administering and enforcing MAUCRSA. (BPC Section 26010.)

4) Establishes grounds for disciplinary action against cannabis licensees, including failures to comply with state requirements as well as local laws and ordinances. (BPC Section 26030.)

5) Authorizes the DCC to issue a citation to a licensee or unlicensed person for violating MAUCRSA or regulations adopted pursuant to MAUCRSA, and allows the DCC to assess an administrative fine of up to $5,000 per violation by a licensee and up to $30,000 per violation by an unlicensed person. (BPC Section 26031.5.)

6) Specifically provides that the unlicensed use of the cannabis universal symbol is a violation of MAUCRSA and empowers the CDTFA to seize unlicensed cannabis products bearing the universal symbol as contraband. (BPC Section 26031.6.)

7) Prohibits a person or entity from engaging in commercial cannabis activity without a state license issued by the DCC pursuant to MAUCRSA. (BPC Section 26037.5.)

8) Authorizes the Attorney General or a city or county counsel or city prosecutor to bring an action against persons engaged in unlicensed commercial cannabis activity for civil penalties of up to three times the amount of the license fee per day of violation. (BPC Section 26038.)

9) Provides for various specified types of cannabis licenses. (BPC Section 26050.)

10) Defines “advertisement” as any written or verbal statement, illustration, or depiction which is calculated to induce sales of cannabis or cannabis products, including any written, printed, graphic, or other material, billboard, sign, or other outdoor display, public transit card, other periodical literature, publication, or in a radio or television broadcast, or in any other media; except that such term shall not include product label or news publications. (BPC Section 26150.)

11) Requires that all advertisements accurately and legibly identify the licensee responsible for its content, by adding, at a minimum, the licensee’s license number, and prohibits a

technology platform from displaying an advertisement by a licensee on an internet webpage unless the advertisement displays the license number of the licensee. (BPC Section 26151.)

12) Prohibits a cannabis licensee or any other person from doing any of the following:

    a) Advertising or marketing in a manner that is false or untrue in any material particular, or that, irrespective of falsity, directly, or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific, or technical matter, tends to create a misleading impression.

    b) Publishing or disseminating advertising or marketing containing any statement concerning a brand or product that is inconsistent with any statement on its labeling.

    c) Publishing or disseminating advertising or marketing containing any statement, design, device, or representation which tends to create the impression that the cannabis originated in a particular place or region, unless the label of the advertised product bears an appellation of origin, and such appellation of origin appears in the advertisement.

    d) Advertising or marketing on a billboard or similar advertising device located on an Interstate Highway or on a State Highway which crosses the California border.

    e) Advertising or marketing cannabis or cannabis products in a manner intended to encourage persons under 21 years of age to consume cannabis or cannabis products.

    f) Publishing or disseminating advertising or marketing that is attractive to children.

    g) Advertising or marketing cannabis or cannabis products on an advertising sign within 1,000 feet of a day care center, school providing instruction in kindergarten or any grades 1 to 12, inclusive, playground, or youth center.

    h) Publishing or disseminating advertising or marketing for unlicensed commercial cannabis activity or for licensed commercial cannabis activity while the licensee's license is suspended. (BPC Section 26152.)

13) Prohibits a cannabis licensee from including on the label of any cannabis or cannabis product or publishing or disseminating advertising or marketing containing any health-related statement that is untrue in any particular manner or tends to create a misleading impression as to the effects on health of cannabis consumption. (BPC Section 26154.)

14) Defines "industrial hemp" as a crop that is limited to types of the plant Cannabis sativa L. having no more than three-tenths of 1 percent tetrahydrocannabinol (THC.) contained in the dried flowering tops, whether growing or not; the seeds of the plant; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin produced therefrom; exempts industrial hemp from the provisions of MAUCRSA. (Health and Safety Code (HSC) Section 11018.5.)

15) Prohibits industrial hemp products from being labeled or advertised with any health-related statement that is untrue in any particular manner as to the health effects of consuming products containing industrial hemp or cannabinoids, extracts, or derivatives from industrial hemp. (HSC Section 110407.)

16) Establishes a regulatory framework for industrial hemp under the Sherman Food, Drug, and Cosmetic Law administered by the California Department of Public Health (CDPH.), under which manufacturers of products containing industrial hemp are required to obtain a process food registration and comply with good manufacturing practices. (HSC Sections 111920 *et seq.*)

17) Requires the distribution or sale of industrial hemp products to include documentation of a certificate of analysis from an independent testing laboratory that confirms that the industrial hemp raw extract, in its final form, does not exceed THC concentration of an amount determined allowable by the CDPH in regulation, or that the mass of the industrial hemp extract used in the final form product does not exceed a THC concentration of 0.3 percent. (HSC Section 111921.)

18) Requires hemp manufacturers to register with the CDPH. (HSC Section 111923.3.)

19) Requires a manufacturer, distributor, or seller of an industrial hemp product to follow packaging, labeling, and advertising laws applicable to cannabis businesses. (HSC Section 111926.)

20) Prohibits inhalable hemp products from being sold to consumers under 21 years of age. (HSC Section 111929.)

21) Provides the California Department of Food and Agriculture (CDFA.) with responsibility for administering and enforcing laws governing the growing, cultivating, and distributing of industrial hemp. (Food and Agricultural Code (FAC) Section 81000 *et seq.*)

22) Imposes limitations and prohibitions on the growth of industrial hemp and requires each crop of industrial hemp to be tested by a laboratory to determine its THC levels. (FAC Section 81006.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: California's legal cannabis market is highly regulated, requiring state-issued licenses for operators at nearly every stage of the consumer cannabis supply chain, including the growth, distribution, and sales process. However, a black market of unlicensed operators continues to persist and successfully utilizes advertising technologies designed for the legal cannabis market to undercut legitimate operators and imperil the burgeoning legal cannabis trade. This includes advertisement of cannabis, cannabis products, and intoxicating hemp online. Seeking to ensure that unlicensed operators are not able to utilize legitimate avenues for advertising in order to unlawfully sell their products online, this bill, sponsored by United Food and Commercial Workers (UFCW) Western States Council, requires (among other things) that online marketplaces that facilitate the sale of cannabis, cannabis products, and intoxicating hemp products have policies and practices to ensure that sellers on the marketplace are licensed. According to the author:

> California's legal cannabis industry has struggled in the face of a growing illicit market for so-called "hemp" products that doesn't provide any health or safety protections for consumers, or even prevent minors from purchasing dangerous intoxicating products. Consumers are finding products advertised as hemp on Amazon and other digital platforms, but studies show that these products contain alarming amounts of synthetic

> intoxicants, undermining both California's legal cannabis market and public health and safety. SB 378 provides enhanced consumer protections by holding online marketplaces strictly liable for damages, and includes reporting requirements for users to flag and report illicit product. I have long supported cannabis legalization and safe access to it, including authoring laws to expand access to medical cannabis and reduce taxes on legal cannabis. By tackling illicit hemp products, we can support legal cannabis businesses and improve California's legal market while protecting minors and consumers from potentially dangerous unregulated substances.

This bill was referred to three policy committees in the Assembly. The Committee on Business & Professions, with primary jurisdiction over the subject of cannabis regulation, approved the bill by a vote of 16-0. The Committee on Privacy & Consumer Protection, with jurisdiction over the bill's consumer protection and technology provisions, recently approved the bill by a vote of 13-0. Relevant to the jurisdiction of this Committee, the bill authorizes a variety of civil enforcement mechanisms, including strict liability, against online marketplaces that violate these requirements and to compensate for the harms caused by the online sale of these products. Those issues are therefore the focus of this analysis.

The long history of cannabis regulation in California. The use of cannabis in California was first authorized for medical patients, with a valid prescription from a doctor, with the approval of Proposition 215 known as the Compassionate Use Act. In the early years of the permissible use of medical marijuana, there was little oversight or regulation of the practice. In 2003, the Legislature stepped into the fray and enacted the state's Medical Marijuana Program by passing aptly numbered SB 420 (Vasconcellos) Chap. 875, Stats. 2003. The Medical Marijuana Program provided for a voluntary medical marijuana patient card, which could be used to verify that the patient or their caregiver had state authorization to cultivate, possess, transport, or use medicinal cannabis. Despite the passage of SB 420, the medical marijuana industry still remained largely unregulated. The battle between the medical marijuana industry and local governments came to an apex at the California Supreme Court, which held that state law did not expressly or implicitly limit the inherent authority of a local jurisdiction to pass ordinances or enact land use measures to regulate the industry. (*Riverside v. Inland Empire Patients* (2013) 56 Cal. 4th 729.)

Following the ruling in *Inland Empire Patients,* the Legislature was once against forced to confront how to regulate the marijuana industry in California. After several attempts, in 2015, the Legislature enacted a comprehensive package of bills to implement the Medical Marijuana Regulation and Safety Act. (AB 243 (Wood) Chap. 668, Stats. 2015, AB 266 (Bonta et al.) Chap 669, Stats. 2018, and SB 643 (McGuire) Chap. 719, Stats. 2015.) These bills established the Bureau of Cannabis Control within the Department of Affairs and, along with the Departments of Public Health and Food and Agriculture, tasked the Bureau with developing a system for regulating the cultivation, manufacture, transportation, testing, distribution, and sale of medicinal cannabis.

The next year, California voters enacted Proposition 64, the Adult Use of Marijuana Act. That Act built upon the existing regulations developed pursuant to the Medical Marijuana Regulation and Safety Act, and retained the Bureau of Cannabis Control as the primary regulator of cannabis in California. Subsequent to the passage of Proposition 64, the Legislature enacted SB 94 (Committee on Budget and Fiscal Review, Chap. 27, Stats. 2017), which reconciled the differences between the medical marijuana regulatory structure and the adult recreational use regulations. SB 94 vested licensing authority for the various aspects of the cannabis business

system with the Bureau of Cannabis Control, the Department of Public Health, and the Department of Food and Agriculture. Additionally, other state agencies, including the Department of the Transportation, the Department of Forestry and Fire Protection, and the State Water Resources Control Board, were tasked with participating in various regulatory processes regarding cannabis in those agencies' area of jurisdiction. Several of the participating agencies have limited enforcement powers of their own to enforce the state's cannabis regulations. Recognizing the need for a centralized enforcement agency, in 2021, the state merged cannabis oversight into the Department of Cannabis Control. (AB 141 (Committee on Budget) Chap. 70, Stats. 2021.)

Proposition 64's strict rules to prohibit marketing of cannabis to minors. An examination of the 2016 General Election Voter Guide highlights that both the proponents and opponents of Proposition 64 focused heavily on the impact that legalizing cannabis would have on children's ability to access cannabis. (https://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf.) The proponents of Proposition 64 highlighted the measure's strict limits on sales and advertisements related to cannabis. The measure explicitly prohibited packaging and labeling that would be attractive to children, providing products that would attract children, and selling cannabis within close proximity to schools and other areas in which children would be present. Additionally, Proposition 64 prohibited "advertising or marketing containing symbols, language, music, gestures, cartoon characters or other content elements known to appeal primarily to persons below the legal age of consumption." (*Ibid*.) SB 94 reconciled Proposition 64 with the provisions of the Medical Marijuana Regulation and Safety Act to create a comprehensive set of cannabis advertisement and marketing regulations that now precludes a cannabis seller from doing all of the following:

- Advertising or marketing in a manner that is false or untrue in any material particular, or that, irrespective of falsity, directly, or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific, or technical matter, tends to create a misleading impression;

- Publishing or disseminating advertising or marketing containing any statement concerning a brand or product that is inconsistent with any statement on the labeling thereof;

- Publishing or disseminating advertising or marketing containing any statement, design, device, or representation which tends to create the impression that the cannabis originated in a particular place or region, unless the label of the advertised product bears an appellation of origin, and such appellation of origin appears in the advertisement;

- Advertising or marketing on a billboard or similar advertising device located on an Interstate Highway or on a State Highway which crosses the California border;

- Advertising or marketing cannabis or cannabis products in a manner intended to encourage persons under 21 years of age to consume cannabis or cannabis products;

- Publishing or disseminating advertising or marketing that is attractive to children;

- Advertising or marketing cannabis or cannabis products on an advertising sign within 1,000 feet of a day care center, school providing instruction in kindergarten or any grades 1 to 12, inclusive, playground, or youth center; and

- Publishing or disseminating advertising or marketing while the licensee's license is suspended.

Last year's SB 1498 (Ashby), Chap. 899, Stats. 2024, enhanced the authority for various government entities to seek penalties against commercial cannabis and industrial hemp businesses that violate the state's strict cannabis advertisement rules. First, recognizing that industrial hemp products are in need of greater regulation, the bill applied many of the existing law's restrictions on cannabis advertising to industrial hemp. Second, the bill imposed civil penalties ranging from 5,000 to 30,000 dollars on persons who engage in cannabis activity or the sales of industrial hemp who violate the advertisement rules. SB 1498 imposed higher penalty levels for persons engaged in cannabis activity without a license, as these parties have essentially committed two violations of the law. The penalties specified in SB 1498 do not preclude the imposition of other penalties for other violations of the law or otherwise limit public prosecutor's authorities found elsewhere in statute. Finally, SB 1498 authorized the Attorney General, county counsels, and city attorneys to seek these penalties.

A somewhat shorter history of California regulating hemp. Botanically speaking, both hemp and marijuana are members of the same plant species, *Cannabis sativa*. While MAUCRSA uses the term "cannabis" to refer to varieties of the species that contain sufficient levels of the cannabinoid THC to produce an intoxicating effect, hemp, has commonly been regarded more as an agricultural plant and has historically been used for products such as paper, textiles, cosmetics, and fabric. California law requires industrial hemp to contain less than 0.3 percent of the product's dry weight to be THC, which is considered trace amounts compared to psychoactive cannabis (which frequently contains between 15-40 percent THC). Hemp is regulated by the CDFA for agricultural purposes, and by the CDPH when it is used in food, beverage, and cosmetic products.

While industrial hemp does not share the same psychoactive properties as cannabis due to its significantly lower amount of THC, both hemp and cannabis contain another cannabinoid known as CBD. Concerns have grown over the past several years regarding the perceived proliferation of intoxicating hemp products. In 2022, the California Cannabis Industry Association (CCIA) issued a white paper in October 2022 titled "Pandora's Box: The Dangers of a National, Unregulated, Hemp-Derived Intoxicating Cannabinoid Market." The CCIA report argued that loopholes in the 2018 Farm Bill, which defined industrial hemp as having no more than 0.3 percent delta-9 THC content by dry weight, inadvertently led to the proliferation of intoxicating hemp products. Specifically, the white paper pointed to a Ninth Circuit decision that the CCIA says "unleashed a Wild West of intoxicants when it ruled that products containing delta-8 THC meet the statutory definition of industrial hemp."

In 2021, AB 45 (Aguiar-Curry) was enacted to significantly expand and clarify the framework under which CBD derived from industrial hemp can be used in food, beverages and dietary supplements. The bill revised or added various definitions relating to hemp products and placed new requirements on hemp manufacturers in exchange for more explicit authority to produce manufactured goods containing CBD derived from hemp. In doing so, the bill expressly specified that foods, beverages, dietary supplements, cosmetics, and pet food are not adulterated by the inclusion of industrial hemp cannabinoids if the level –like the federal level -- is no more than 0.3 percent delta-9 THC content by dry weight. Setting this level may inadvertently have left a significant loophole in existing law, allowing intoxicating hemp products to proliferate.

The FDA has expressed concern that intoxicating hemp products "likely expose consumers to much higher levels of the substance than are naturally occurring in hemp cannabis raw extracts." According to the FDA, 104 reports made to the FDA of adverse events in patients who consumed delta-8 THC products between December 1, 2020, and February 28, 2022, over half of which resulted in medical intervention or hospital admission. (U.S. Food & Drug Administration, "5 Things to Know about Delta-8 Tetrahydrocannabinol – Delta-8 THC" (May 4, 2022, available at https://www.fda.gov/consumers/consumer-updates/5-things-know-about-delta-8-tetrahydrocannabinol-delta-8-thc?uid=2efd850b0a783s16.)

Strict Liability. As a general rule, "[e]veryone is responsible, not only for the result of [their] willful acts, but also for an injury occasioned to another by [their] want of ordinary care of skill in the management of [their] property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury [on themselves]." (Civil Code Section 1714 (a).) One important public policy exception to the rule of negligence allows injured consumers to recover for injuries caused by *dangerous and defective products* without having to prove negligence by manufacturers and others in a dangerous product's supply chain. The landmark decision of *Greenman v. Yuba Power Prods., Inc.* (1963) 59 Cal. 2d 57, firmly established that "a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." (*Id.* at p. 62.) Strict liability in tort is not based on the law of warranty, either express or implied, nor is it based on negligence. Its purpose is to insure that the costs of injuries resulting from defective products is borne by the makers and distributors of the products, rather than the injured individual. (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 31.)

Lawmakers have wide latitude to declare an offense and to exclude, or include, elements of knowledge and diligence as they see fit. (*Lambert* v. *California* (1957) 355 U.S. 225, 228.) In areas subject to strong police regulation, the state may impose criminal sanctions, without requiring any mens rea requirement for the crime, because "the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." [Citation omitted.] (*People v. Martin* (1989) 211 Cal.App.3d 699, 714-715.) The defendant's "'guilty mind'" is shown by defendant's knowing and intentional participation in the proscribed act].) Thus, strict liability criminal offenses include " 'illegal sales of intoxicating liquor, … sales of impure or adulterated food or drugs, … sales of misbranded articles, … violations of traffic regulations, and … violations of general police regulations, … passed for the safety, health or well-being of the community.' " (1 Witkin & Epstein, Cal. Criminal Law, *supra*, Elements, § 17, at pp. 221–222; *People v. Blick* (2007) 153 Cal.App.4th 759, 770.)

However, strict liability theory – whether based upon a defective product; a "public danger;" a wild animal; an abnormally dangerous animal; or an abnormally dangerous activity (Restatement (Third) on Torts: Liability for Physical Harm, Sections 20-22)--is premised on the *inherent danger* that the product/item/animal/activity poses to the public.

Section 230 and the First Amendment. Section 230 of the Communications Act of 1934, codified at 47 U.S.C. Section 230, provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." This provision was designed to foster the development of online services by shielding platforms from liability arising from user-generated content.

But while Section 230(c)(1) provides broad immunity for passive content hosting, it does not grant a free pass to platforms for their own conduct. The Supreme Court and lower courts have emphasized that this immunity does not extend to actions that originate from the platform itself. The Ninth Circuit's decision in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC* (2008) 521 F.3d 1157, 1162, remains instructive: when a platform contributes materially to the unlawfulness of content—such as by soliciting discriminatory information and using it to drive matching functions—it becomes a content provider itself and is not immune. Similarly, in *Lemmon v. Snap, Inc.* (9th Cir. 2021) 995 F.3d 1085, the court held that Snap's "Speed Filter" feature, which encouraged dangerous behavior, was a product design—not a publishing decision—and therefore not protected by Section 230. The Supreme Court's decision in *Moody v. NetChoice, LLC* (2024) 603 U.S. 707, while focused on First Amendment challenges to state content moderation laws, reinforced the expressive nature of platform curation. The Court acknowledged that platforms engage in editorial discretion protected under the First Amendment when they decide what content to include, exclude, or prioritize. But that expressive function may cut both ways: if a platform's curatorial decisions are expressive, they may qualify for First Amendment protection—but that same expressive activity may fall outside the liability shield of Section 230, which is limited to neutral intermediaries.

The functional distinction between hosting speech and engaging in tortious conduct has gained further traction in more recent cases. In *Anderson v. TikTok, Inc.* (3d Cir. 2024) 83 F.4th 512, the court built on the *Moody* decision to allow claims to proceed based on TikTok's algorithmic amplification of harmful challenge videos. The court acknowledged that claims grounded in TikTok's product design and recommender systems fell outside Section 230 immunity, even if the harmful content originated from third parties. So long as the complaint alleged that the platform's conduct—rather than its publishing role—was the cause of injury, the case could proceed.

This potentially inverse relationship between First Amendment protection and Section 230 immunity remains unsettled. In Northern District of California's recent decision in *Doe v. Backpage, LLC* (N.D. Cal. 2025) 768 F.Supp.3d 1057 the court rejected that dichotomy. Crucially, the court rejected the argument that algorithmic "connections" between users are distinct from content publication. Relying on the Ninth Circuit's ruling in *Dyroff v. Ultimate Software Group*, Inc. (2019) 934 F.3d 1093, the court found that content recommendations and user matching are tools meant to facilitate third-party communication and do not strip a platform of immunity. Further, the court declined to interpret *Moody* as overruling *Dyroff*, concluding instead that editorial discretion can be simultaneously protected under the First Amendment and immunized under Section 230. The ruling held that so long as the harm arises from a platform's publication decisions—whether in content, user matching, or moderation policies—Section 230 applies.

In sum, courts are all over the place when it comes to the reach of Section 230 and the interplay between its liability shield and First Amendment protections. And the Supreme Court has successfully sidestepped the issue—at least for now.

The First Amendment: Compelled Commercial Speech and the Overbreadth Doctrine. "Commercial speech" is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded "noncommercial speech." (*Bolger* v. *Youngs Drug Products Corp*. (1985) 463 U.S. 60; *Central Hudson Gas & Electric Corp*. v. *Public Service Comm'n of New York* (1980) 447 U.S. 557.) The "constitutionally protected interest in not

providing any particular factual information in his advertising is minimal. . . . [A]n advertiser's rights are reasonably protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers. . . . The right of a commercial speaker not to divulge accurate information regarding his services is not . . . a fundamental right." (*Zauderer v. Office of Disciplinary Counsel* (1985) 471 U.S. 626, 651, 652, fn.14.)

However, even a theoretically valid limit on commercial speech can be invalidated if it is overbroad in its application. The Overbreadth doctrine focuses on the need for precision in drafting a statute that may affect First Amendment rights, and more concretely, allows a special kind of facial challenge to statutes. (*NAACP v. Button* (1963) 371 U.S. 415, 432–33.) If a statute is so broadly written that it sweeps in protected speech and could therefore have "a deterrent effect on free expression," it will be invalidated. (*Members of City Council v. Taxpayers for Vincent* (1984) 466 U.S. 789, 798.)

This bill imposes various requirements on online marketplaces (as defined) that sell cannabis, cannabis products, and intoxicating hemp with corresponding penalties for violations of these requirements.

First, it requires the online cannabis marketplace to (1) include certain policies in its terms of service regarding steps to ensure that sellers of cannabis are related products are licensed; and (2) establish mechanisms for users, and individuals who are not users, to report to the online marketplace the existence of an advertisement of one of these products, which all must be reviewed by a human. A later section of the bill duplicates these requirements for online hemp marketplaces. These provisions do not appear to raise Section 230 issues because the bill seeks to regulate online marketplace conduct, not speech or publication.

In order to avoid duplicative and arguably redundant and requirements, the author may wish to consolidate the separate sections into one regulatory scheme for online marketplaces selling relevant products, whether cannabis or hemp, at least to the extent that the products are all intoxicating and potentially dangerous.

Violations of these provisions subject such online marketplaces to civil penalties of up to $10,000 per violation, per day, along with other remedies, such as punitive and compensatory damages and attorneys' fees and costs. The bill in print allows these actions to be brought by "a party" but provides no guidance about how a person or entity qualifies to be "a party."

"Party" is a technical term that means a person or entity who brings, or against whom a suit is brought, whether in law or equity. (*Merchants' Bank v. Cook* (1877) 4 Pick. 405.) It does not appear to be used in any other section of existing code in relation to the *ability* (or "standing") of a person or entity *to bring a civil action*.

The author's goal, by using this terminology, is to allow the broadest possible enforcement of the bill's prohibitions. However, the language may be so broad and so general that it arguably authorizes no one to enforce the law (except, perhaps, the Attorney General who has constitutional authority, as the chief law officer of the State "to see that the laws of the State are uniformly and adequately enforced." (Cal. Const., art. V, Sec. 13).) If the author wishes to allow all private persons to be deputized to enforce the law, the author could do so by replicating, for example, Section 17300 of the Business & Professions Code, which read as follows prior to being amended by Proposition 26 in 2004:

> 17203. Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by **any person** of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to **any person** in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. (Section 17300, as amended by SB 1586, Chap. 430, Stats. 1992 [with emphasis added].)

If a statute does not clarify this point, the assumption is that an action may only be brought by a person whose rights are at issue in a justiciable controversy. (*Golden Gate Bridge & Highway Dist. v. Felt* (1931) 214 Cal. 308, 316.)

As the bill moves forward, the author should clarify the persons and/or entities who are authorized to bring a civil action to enforce the bill's provisions and use a term other than "party" (perhaps "person") to describe them and perhaps authorize public prosecutors, including the AG, to bring civil actions to enforce the requirements of the bill.

Second, the bill provides that if the cannabis marketplace does not verify whether a seller of cannabis is licensed, the marketplace must interpose a clear and conspicuous graphic that a consumer must acknowledge and click through before viewing or engaging with other content on the marketplace. The bill specifies that the graphic must take up at least one-half the screen and warn the consumer of specified dangers.

This provision can be enforced in a civil action by "'any person' who identifies an online cannabis marketplace that displays, stores, or hosts an advertisement from, or business information about, an unlicensed seller of cannabis or cannabis products[.]" The plaintiff in such cases can seek civil penalties of $250,000 along with reasonable attorneys' fees and costs. If the online cannabis marketplace violates an injunction requiring compliance with these requirements, the online marketplace must cease operations in the state "until a receiver appointed by the court affirms to the court that the marketplace is in compliance." In any action to enforce such an injunction, the party obtaining enforcement shall be entitled to an award of twice its reasonable attorneys' fees and costs and a civil penalty of $500,000.

This provision raises potential First Amendment concerns because it compels commercial speech. As a commercial disclosure requirement, it likely would be subjected to intermediate scrutiny. Using this standard, a court likely would find that the bill's requirements are reasonably related to the state's interest in preventing online sale of products such as cannabis and intoxicating hemp that California has determined should be subject to strict regulation and therefore may be sold only by licensed sellers. However, as some opponents of the bill point out, the bill applies to some marketplaces that sell some products that are not intoxicating. For example, it applies to all online hemp marketplaces, including marketplaces that may sell only industrial hemp or only hemp "wellness products" that are not intoxicating. Due to this arguable overbreadth, a court in theory could find that the bill's notification mandate–at least when applied to those online marketplaces—was unenforceable. (See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 ["a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts, and its deterrent effect on legitimate expression is both real and substantial"].)

As the bill moves forward, the author should endeavor to ensure that its provisions are narrowly tailored to apply, to the greatest extent possible, only to products that are (and can be known to be) intoxicating in order to avoid concerns about the bill's potential overbreadth.

Third, the bill prohibits online marketplaces from engaging in "paid online advertising" related to unlicensed sellers of cannabis, intoxicating hemp products, or unregistered hemp products. "Paid online advertisement" is defined to mean an advertisement or promotional information displayed on a computer or mobile device about, or for an offer of, the sale of these products, for which an online marketplace receives compensation. However, the bill provides that such compensation can either be directly from a business or "indirectly by increasing the number of individuals who visit the marketplace."

The bill provides multiple penalties for violations of this provision. If a platform violates this provision and is a *substantial factor* in an unlawful transaction between a consumer and an online seller, the online marketplace would be *strictly liable* for any damages caused to the consumer. The bill ties this to traditional products liability standards "to the same extent as a retailer would be liable for selling a defective product in the retailer's physical store, regardless of whether the online marketplace ever took physical possession of, or title to, the intoxicating hemp product or unregistered hemp product." Damages are doubled if the platform knew or should have known that the seller was not licensed. The damages are tripled if the consumer was a minor.

Strict liability case law has generally been based upon a product being defective or having a design flaw. When the defendant is an integral part of the production, marketing, or distribution of the defective product, like all other parties involved in that enterprise, the defendant is strictly liable for any injuries or damage caused by the product. (*Vandermark v. Ford Motor Co*. (1964) 61 Cal.2d 256, 262.) Alternatively, in order to regulate a "public danger" the Legislature may impose strict civil and even criminal liability for the misuse or distribution of products such as dangerous chemicals; impure food and drugs; or adulterated food and drugs. (See *People v. Martin, supra,* 211 Cal.App.3d 699, 714-715.) In terms of the liability of an online marketplace in the distribution chain of a defective product (or presumably an item that represents a "public danger"), the California Supreme Court found the online marketplace giant Amazon to be strictly liable for a defective (exploding) hover board sold on its platform, despite the fact that Amazon never took possession of the hover board. (*Loomis v. Amazon.com LLC* (2021) 63 Cal.App.5th 466.)

This bill has different triggers for its strict liability provisions, depending on what the product is; who the seller is; and what the harm is.

- For **cannabis** transactions with an **unlicensed** seller: strict liability is imposed when the act of online advertising is a "substantial factor in an unlawful transaction" and there are "**damages caused to the consumer**."

- For **intoxicating hemp** or **unregistered hemp** transactions with any seller: strict liability is imposed when the act of online advertising is a "substantial factor in an unlawful transaction" and there are "**damages caused to the consumer**."

The bill provides double damages in the situations above if additional circumstances exist:

- For **cannabis** transactions: double damages **for harm to a consumer caused by the ingestion of cannabis or a cannabis product** if the online marketplace **knew or should have known** that the seller that offered the cannabis or cannabis product was not licensed.

- For **intoxicating hemp** or **unregistered hemp** transactions: **for harm to a consumer caused by the ingestion of an intoxicating hemp product or an unregistered hemp product** if the online marketplace **knew or should have known** that the product was an intoxicating hemp product or an unregistered hemp product.

The bill provides treble damages in situations where double damages would apply, but "damages [are] suffered by a child."

The bill also seeks to impose *strict liability* upon the online marketplace on the basis of their advertising "related to unlicensed sellers of cannabis or cannabis products, intoxicating hemp products, or unregistered hemp products." The bill's theory appears to be that the products—like exploding hover boards-- are inherently dangerous or defective because they are either sold by unlicensed sellers (in the case of cannabis) or sold online (in the case of intoxicating hemp and unregistered hemp).

While it is undoubtedly unwise and potentially dangerous to buy any product that could be intoxicating from an unlicensed seller (and maybe online), not all products sold on online hemp marketplaces are dangerous (or defective), even if sold by unlicensed sellers. For example, unregistered hemp products that are not intoxicating could be swept up in the bill's definitions. To the extent that the bill narrowly applies to intoxicating substances that are especially dangerous to children, a court is more likely to find that the products are within the category of products –'illegal sales of intoxicating liquor, … sales of impure or adulterated food or drugs, … sales of misbranded articles, … violations of traffic regulations, and … violations of general police regulations, … passed for the safety, health or well-being of the community'" – that are appropriate topics for the imposition of strict liability by the Legislature. (See *People v. Blick, supra,* 153 Cal.App.4th at p. 770.) Conversely, if a court found that the bill's definitions were not narrowly tailored to define such products, it may not uphold the bill's strict liability provisions.

As the bill moves forward, in order to ensure that unregistered hemp products that are not required to be registered (because they are not intoxicating) *are not inadvertently swept into the bill's strict liability provisions, the author should consider, as much as possible, removing from the hemp products that are not intoxicating.*

This provision also implicates both the *First Amendment* and *Section 230*. The bill imposes significant monetary penalties for the online platform's advertisement. The government cannot punish mere advocacy of illegal conduct. In *Brandenburg v. Ohio* (1969) 395 U.S. 444, the Supreme Court established that speech advocating illegal conduct is protected under the First Amendment, unless the speech is likely to incite "imminent lawless action."

In terms of Section 230 immunity, while some cases have held that it applies even to platforms whose recommendation algorithms curate and promote illicit content, there may be movement among courts towards finding that immunity should not apply in such cases. (See *Force v. Facebook, Inc.* (2d Cir. 2019) 934 F.3d 53, 76.) Last year the Third Circuit adopted this position in the case of *Anderson v. TikTok Inc*. (3d Cir. 2024) 116 F.4th 180, 184 184, holding that TikTok's recommendation algorithm—which promoted a "Blackout Challenge" to a 10-year-old

girl who then died from self-asphyxiation—was the platform's own expressive conduct and therefore fell outside of Section 230's protection. The court drew on a recent Supreme Court holding that an algorithm that editorially curates third-party speech is protected by the First Amendment. (*Id.*, discussing *Moody v. NetChoice, LLC* (2024) 603 U.S. 707.) When a platform contributes materially to the unlawfulness of content, it becomes a content provider itself and is not immune. (*Fair Housing Council of San Fernando Valley, supra,* 521 F.3d at p. 1162.)

The bill may be pushing the bounds of how the Legislature may regulate and deter online advertisement of products that are sold online. Ultimately it will be for the courts to determine the validity of these provisions in relation to First Amendment, Overbreadth, and Section 230 challenges on a case-by-case basis, most likely based upon the specific product that is sold in a specific instance.

Is the bill, as currently conceived, fair to responsible online marketplaces that endeavor in good faith to follow the law and comply with the bill? Apart from the specific legal issues discussed above, the Legislature may wish to ask whether it is *fair* to impose liability, including strict liability, on online cannabis and hemp marketplaces in all of the circumstances envisioned by the bill. For example, an online cannabis marketplace could have policies in place—as required by this bill--to ensure that sellers of cannabis are licensed as required by law. And the online cannabis marketplace could address in its terms of service all of the issues that the bill requires to be addressed. And the online cannabis marketplace could establish a clear and conspicuous mechanism on its platform to allow individuals to report sales by unlicensed sellers, as required by the bill. And the online cannabis marketplace *did*, in fact, investigate and responds to all complaints in a timely and effective manner. But it turned out, unbeknownst to the responsible online cannabis marketplace, that an online seller had fraudulently identified themselves to the online marketplace and was not, in fact, licensed as the responsible marketplace believed, after checking the state's online registry and finding someone with the same name as the (fraudulent) unlicensed seller. Under the bill in print, in such a scenario, the responsible online cannabis marketplace could nevertheless be found liable for a civil penalty of $250,000, plus attorneys' fees and costs, if any person identified that the responsible online cannabis marketplace had displayed, stored, or hosted an advertisement from, or business information about, the (fraudulent) unlicensed seller of cannabis. The same would be true on the basis of advertising by the (fraudulent) unlicensed seller on the responsible cannabis marketplace's platform: under the bill, the online marketplace would be *strictly liable* for all damages caused to a consumer as a result of a sale by that (fraudulent) unlicensed seller. eBay and a coalition of smaller peer to peer online marketplaces have shared concerns related to these issues with the Committee (but are working with the author of the bill and do not have a formal position on the bill).

As the bill moves forward, the author should continue to work with stakeholders, as well as staff from all of the policy and fiscal committees that previously have analyzed this bill, to ensure that the bill's liability provisions are fair to responsible online marketplaces that endeavor in good faith to follow the law and comply with the bill.

Amendments requested by opponents (who are opposed to the bill, unless amended). In a joint letter, sellers of hemp "wellness products" – including Cornbread – request that the bill be amended as follows:

> [T]o protect the good-acting hemp manufacturers with age gating technology as well as compliance certification from reputable certifying agencies like the US Hemp Authority® Certification Program or NSF. These certifying agencies can provide third party oversight which ensures audits, product safety and quality, GMP compliance, third party testing and accurate product labeling. Language to remove actors operating within the boundaries of age gating and manufacturing compliance sharpens the enforcement tools to those who deserve it, and allows focus in implementation.

Medterra, which says it is a "national leader in hemp-driven wellness products, requests a number of amendments to the bill, including to do the following:

> 1. Protect minors: Require robust age-gating (21+) and labeling for all online hemp platforms, with enforceable penalties for violations.
>
> 2. Define intoxication by effect: Legally define "intoxicating cannabinoids" based on dosage and effect, not plant source. Exempt clearly labeled, non-intoxicating full-spectrum CBD products meeting ≤10mg THC/serving and <0.3% by weight.
>
> 3. Preserve consumer access: Allow the sale of certified, non-intoxicating full-spectrum hemp CBD products through January 1, 2028.
>
> 4. Ensure product safety: Set interim standards for labeling, testing, and third-party verification. Accept certification from reputable programs such as:
>
> US Hemp Authority, NSF International, or USDA Organic, which require:
>
> - Third-party audits and ISO-accredited testing
> - Good Manufacturing Practices (GMP)
> - Clear potency and contaminant disclosures
> - Child-resistant packaging and accurate labeling
>
> 5. Avoid constitutional violations: Eliminate geographic sales restrictions, which risk violating the Dormant Commerce Clause. Courts have already struck down similar laws in other states. Restricting lawful interstate commerce to shield in-state cannabis operators would likely trigger litigation—and SB 378 could be overturned in federal court. California can protect consumers without creating constitutional exposure.

Most of the US Hemp Authority's suggestions fall within the jurisdiction of the other Assembly policy committees that previously heard the bill. However, the issue of a possible Dormant Commerce Clause violation is in the jurisdiction of this Committee.

The Dormant Commerce Clause. Article I, Section 8 of the United States Constitution bestows the power upon the federal government to regulate commerce among the states. This clause has been interpreted to include a "dormant limitation on the authority of the States to enact legislation affecting interstate commerce." (*Healy v. Beer Inst.* (1989) 491 U.S. 324, 326 n.1.) Thus, it is aptly referred to as the Dormant Commerce Clause. The key questions when determining whether a state law is in violation of this constitutional principle are (1) whether the law discriminates between in-state and out-of-state actors; and (2) whether the law controls commerce occurring wholly outside the boundaries of the State. State laws can impact businesses outside of the state and can be upheld despite the fact that they primarily impact out-of-state

businesses. (See, e.g. *West Lynn Creamery, Inc. v. Healy* (1994) 512 U.S. 186 [upholding Massachusetts law, taxing all fluid milk sold to retailers, even though most milk producers were out of state].) Similarly, the US Supreme Court upheld California's Proposition 12, which banned the sale of eggs and meat from animals confined in cages, despite its impact on out of state meet and dairy producers. (*National Pork Producers Council v. Ross* (2023) 598 U.S. __.)

One of the opponents of this bill, U.S. Hemp Roundtable, Inc., challenged emergency regulations by CDPH on the basis that they were preempted by federal law and violated the Dormant Commerce Clause. The Los Angeles Superior Court, in *U.S. Hemp Roundtable, Inc., et al. v. California Department of Public Health, et al.,* denied the plaintiffs' TRO request to stop the regulations from taking effect. (See https://s43720.pcdn.co/wp-content/uploads/2024/10/CA-hemp-TRO-denied.pdf.) The trial court found that the plaintiff was unlikely to succeed on the merits, observing:

> 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.

The superior court's ruling does not appear to have been appealed. Given that this bill applies equally to all products—whether sold online within the state, or sold from out of state into the state – the bill does not facially discriminate against out-of-state sellers. It also does not apply wholly outside of the state's boundaries. Therefore, it does not appear vulnerable to a successful Dormant Commerce Clause challenge.

ARGUMENTS IN SUPPORT*:* Sponsor UFC writes the following to explain the need for and its support of the bill:

> SB 378 comes at a pivotal time where online platforms have made it easier for illicit cannabis operators to market and sell their products outside the scope of state tax systems and product safety regulations. Online platforms have failed to properly combat this ongoing problem due to a complex regulatory environment. Executives at weedmaps.com claim that since their company is not licensed by the Bureau of Cannabis Control, they are not subject to bureau enforcement, and are refusing to stop running advertisements for unlicensed cannabis retailers [fn].
>
> In the US in 2018, a tenth of young people who used drugs appear to have connected with dealers through the internet, with the large majority doing so through social media. Additionally, these digital dealers ran hundreds of paid advertisements on Meta platforms in 2024 to sell illegal opioids, and what appeared to be cocaine and ecstasy pills, according to a report by the Tech Transparency Projects [fn], and federal prosecutors are investigating Meta over the issue.[fn]
> . . .
> All of these factors have created an uneven playing field for licensed and unionized cannabis businesses. The industry's legal operators are paying taxes, undergoing stringent testing, and following state regulations, while their illicit counterparts often do not. A staggering 91 percent of products analyzed were sold without collecting California's required sales taxes, and none of the vendors remitted the state's cannabis excise tax when legally obligated to do

so. [fn] This dynamic has led to a thriving shadow market where the risk of consuming unsafe products is high, and state and local governments are losing out on significant tax revenue.

ARGUMENTS IN OPPOSITION: A coalition of technology organizations—TechNet, The Computer and Communications Industry Association, California African American Chamber of Commerce, and Internet Works--writes the following to explain, in part, the basis for their opposition to the bill:

Strict Liability

SB 378 places strict liabilities against violators. It holds anyone who violates the bill to be held liable for various civil penalties of thousands of dollars, but it also includes a variety of other punitive damages. With the definitions of SB 378 being overbroad and including a great number of industries, online platforms would face being legally responsible for products they neither create nor distribute. They would be compelled to invest heavily into simply attempting to comply to such high requirements of the bill. To do so, platforms would be forced to remove or block large swaths of legitimate or neutral content, thus limiting consumer access to information and choice.

Paid Advertisements

The advertising provisions of SB 378 create far-reaching problems by adopting an overly broad definition of "paid online advertisement" and imposing strict liability on platforms that display them. These rules require online marketplaces (which also has an overly broad definition) to undertake the onerous—and impractical—task of continuously verifying advertisers' licensing or registration status for every cannabis or hemp product featured. Faced with the risk of steep penalties and extensive litigation, many platforms would likely ban all cannabis and hemp-related advertising—whether legitimate or not—rather than attempt compliance. . . .

REGISTERED SUPPORT / OPPOSITION:

Support

California Children's Hospital Assn
California Medical Association (CMA)
California Norml
California State Association of Counties (CSAC)
Consumer Federation of California
County Health Executives Association of California (CHEAC)
County of Santa Clara
League of California Cities
Rural County Representatives of California (RCRC)
San Mateo; County of
SEIU California
UFCW - Western States Council (sponsor)
Youth Forward

Opposition

California African American Chamber of Commerce
Computer & Communications Industry Association
Cornbread Hemp (unless amended)
Dear Flor
Internet.Works
Medterra (unless amended)
TechNet
US Hemp Roundtable

Analysis Prepared by: Alison Merrilees / JUD. / (916.) 319-2334