



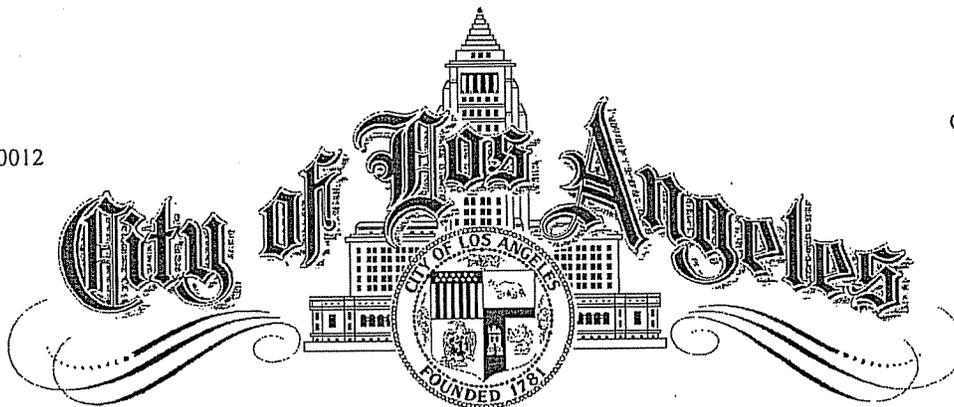
CARMEN A. TRUTANICH
City Attorney

Medical Marijuana Ordinance and Briefing Materials

**Transmittal to the City Council
November 2009**

City Hall East
200 N. Main Street
Room 800
Los Angeles, CA 90012

(213) 978-8100 Tel
(213) 978-8312 Fax
CTrutanich@lacity.org
www.lacity.org/atty



CARMEN A. TRUTANICH
City Attorney

REPORT NO. R 09 - 0387

REPORT RE:

NOV 13 2009

**FIFTH REVISED DRAFT ORDINANCE ESTABLISHING REGULATIONS
REGARDING MEDICAL MARIJUANA COLLECTIVES**

The Honorable City Council
of the City of Los Angeles
Room 395, City Hall
200 North Spring Street
Los Angeles, CA 90012

Council File No. 08-0923

Honorable Members:

On October 20, 2009, this office transmitted a fourth revised draft ordinance. Since that transmittal, we have received dozens of comments. Many proposed widely accepted improvements. Others suggested policy changes that fall within your province as decision-makers. To expedite your action on this measure, we now submit a fifth revision, approved as to form and legality. In separate lists below, we highlight the improvements versus the policy matters that you will want to resolve. We continue to strongly recommend your adoption of an ordinance at the earliest possible time.

Background

This draft ordinance adds Article 5.1 to Chapter IV of the Los Angeles Municipal Code (LAMC), regulating collective cultivation of medical marijuana in the City of Los Angeles consistent with state law. On April 14, 2008, pursuant to a request from the City Council, the City Attorney's Office transmitted an initial draft ordinance. Working with the Planning and Land Use Management ("PLUM") Committee, we thereafter transmitted: a) a first revision on January 26, 2009; b) technical improvements in a second revision on February 6, 2009; c) a third revised draft on September 22, 2009; and d) a fourth set of revisions on October 20, 2009.

CEQA Finding

If you wish to adopt the ordinance, you must first comply with the California Environmental Quality Act (CEQA). Regarding a finding pursuant to CEQA, we believe that adoption of this ordinance is exempt from CEQA under State CEQA Guidelines sections 15060(c)(2) and (3) because it will not result in a direct or reasonably foreseeable indirect physical change in the environment, since it merely establishes regulations for medical marijuana collectives and will result in a substantial decrease in the number of locations that are currently in existence. In addition, City Council could determine that adoption of the ordinance is exempt from CEQA under City CEQA Guidelines Article II, Section 1 (General Exemption) because it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment. If the City Council concurs, it may comply with CEQA by making one or both of these findings prior to or concurrent with its action on the ordinance. We recommend that you also direct staff to file a "Notice of Exemption" as permitted by CEQA. This will have the effect of shortening the period of time within which a CEQA-based legal challenge can be brought against the City.

Summary of Improvements

- At the request of the Department of Building and Safety (DBS), we have further detailed the registration and pre-inspection process, including the requirement for an agricultural certificate of occupancy.
- We deleted the unnecessary requirement that collective members provide their names to the City as part of the registration process. Their names will continue to be maintained in the collective's own books and records.
- For clarity, we amended the title and terms of the provision that discusses when the registration of a collective becomes null and void.
- The requirement that the windows of a collective be secured by exterior bars has been amended to require the securing bars on the interior instead. A fireproof safe to hold books and records is now a requirement, and specifications from DBS regarding doors and exterior lighting have been added.
- Collective signage must be unlighted. Also, additional language has been provided regarding the interior notice that all collectives must post.
- An unclear reference to "edibles" has been deleted. It had been interpreted to mean that edible forms of medical marijuana could not be provided to patients. That was never the intention. The intention was to prevent the sale of manufactured medical marijuana products, including edibles.
- A provision has been added to confirm that collective members may share their cultivation expenses. Similarly, a provision has been added to confirm that the ordinance does not affect any reimbursement rights of primary caregivers under state law. State and case law govern these topics. This was always the intention of our ordinance, which is now expressly codified.

Summary of Policy Considerations

- **Registration Responsibility.** The previous draft specified the Office of Finance as the department responsible for registration. This draft specifies DBS because DBS has agreed to undertake this assignment, but this delegation of the responsibility for registration has not been considered by the policy makers.
- **No Sales.** The fifth draft ordinance, like all previous versions, bans medical marijuana sales. Sales remain precluded by state and federal law. We have attached a brief on the applicable law. We have also enclosed the ballot pamphlet that accompanied the voters' adoption of the Compassionate Use Act, including its neutral legislative analysis that presumed no fiscal impact from the measure and its proponents' express statements that cultivation for personal use but no sales would be allowed.
- **Cap on Number of Collectives.** We have not included a cap on the total number of collectives that may lawfully register. Either a complete ban or a cap on storefront dispensaries is, however, common in other California jurisdictions. We have provided three charts that identify the practices elsewhere in the state. If a cap were favored, it could be designed to prevent over-concentration of collectives in geographic areas, such as with a cap by Council District or by Community Plan area.
- **Distance from Sensitive Uses.** This draft maintains the 1000 foot radius distance from sensitive uses that has been specified in each of the prior drafts. We have anticipated that the propriety of this distance will be confirmed by a mapping exercise of the City Planning Department. However, to date, we have not received actual maps to confirm that the 1000 foot distance strikes an appropriate balance between sensitive uses and compassionate access.
- **Preferences to Previous Registrants.** The fourth draft gave two privileges to those facilities that registered prior to November 12, 2007 under the ICO: 1) 180 days to comply fully with the new law; and 2) a 180-day head start to register under the new law, during which time other facilities cannot attempt to register. All other facilities are required to close immediately upon adoption of the new law. We have received criticism for proposing to treat previous registrants under the ICO differently from other collectives.

Copies of the fifth revised draft ordinance have been provided, pursuant to Council Rule 38, to the Los Angeles Police Department and the Department of Building and Safety, with a request that all comments, if any, be presented directly to your Honorable Body at the time this matter is considered.

If you have any questions regarding this matter, please contact Assistant City Attorney Sharon Siedorf Cardenas at (213) 978-8235 or Deputy City Attorney Heather Aubry at (213) 978-8380. They or another member of this office will be available when you consider this matter to answer any questions you may have.

Sincerely,

CARMEN A. TRUTANICH, City Attorney

By



WILLIAM W. CARTER
Chief Deputy City Attorney

WWC:SSC:HA:aa
Transmittal

ORDINANCE NO. _____

An ordinance adding Article 5.1 to Chapter IV of the Los Angeles Municipal Code and amending Section 91.107.3.2 of the Los Angeles Municipal Code to implement the Compassionate Use Act and the Medical Marijuana Program Act consistent with the provisions of the Acts, but without violating state or federal law.

WHEREAS, although the possession and sale of marijuana remain illegal under both state and federal law, California voters approved the Compassionate Use Act ("CUA") in 1996 to exempt seriously ill patients and their primary caregivers from criminal liability for possession and cultivation of marijuana for medical purposes; and

WHEREAS, the Medical Marijuana Program Act of 2003 ("MMPA") provides for the association of primary caregivers and qualified patients to cultivate marijuana for specified medical purposes and also authorizes local governing bodies to adopt and enforce laws consistent with its provisions; and

WHEREAS, the City of Los Angeles enacted an Interim Control Ordinance in 2007 for the temporary regulation of medical marijuana facilities through a registration program, which resulted in the unintended proliferation of storefront medical marijuana dispensaries to a number currently estimated to exceed 500 such locations, presenting a substantial risk of unlawful cultivation, sale, and the illegal diversion of marijuana for non-medical uses; and

WHEREAS, there have been recent reports from the Los Angeles Police Department and the media of an increase in and escalation of violent crime at the location of medical marijuana dispensaries in the City of Los Angeles, and the California Police Chiefs Association has compiled an extensive report detailing the negative secondary effects associated with medical marijuana dispensaries; and

WHEREAS, medical marijuana that has not been collectively or personally grown constitutes a unique health hazard to the public because, unlike all other ingestibles, marijuana is not regulated, inspected, or analyzed for contamination by state or federal government and may, as with samples recently tested by a U.S. Food and Drug Administration laboratory, contain harmful chemicals that could further endanger the health of persons who are already seriously ill and have impaired or reduced immunities; and

WHEREAS, the City of Los Angeles has a compelling interest in ensuring that marijuana is not distributed in an illicit manner, in protecting the public health, safety and welfare of its residents and businesses, in preserving the peace and quiet of the neighborhoods in which medical marijuana collectives operate, and in providing compassionate access to medical marijuana to its seriously ill residents.

NOW, THEREFORE,

**THE PEOPLE OF THE CITY OF LOS ANGELES
DO ORDAIN AS FOLLOWS:**

Section 1. A new Article 5.1 is added to Chapter IV of the Los Angeles Municipal Code to read:

ARTICLE 5.1.

MEDICAL MARIJUANA COLLECTIVE

SEC. 45.19.6. PURPOSES AND INTENT.

It is the purpose and intent of this article to regulate the collective cultivation of medical marijuana in order to ensure the health, safety and welfare of the residents of the City of Los Angeles. The regulations in this article, in compliance with the Compassionate Use Act and the Medical Marijuana Program Act, California Health and Safety Code Sections 11362.5, *et seq.*, ("State Law") do not interfere with a patient's right to use medical marijuana as authorized under State Law, nor do they criminalize the possession or cultivation of medical marijuana by specifically defined classifications of persons, as authorized under State Law. Under State Law, only qualified patients, persons with identification cards, and primary caregivers may cultivate medical marijuana collectively. Medical marijuana collectives shall comply with all provisions of the Los Angeles Municipal Code ("Code"), State Law, and all other applicable local and state laws. Nothing in this article purports to permit activities that are otherwise illegal under federal, state, or local law.

SEC. 45.19.6.1. DEFINITIONS.

A. The following phrases, when used in this article, shall be construed as defined in California Health and Safety Code Sections 11006.5, 11018, 11362.5 and 11362.7:

"Attending physician;"
"Concentrated Cannabis;"
"Identification card;"
"Marijuana;"
"Person with an identification card;"
"Primary caregiver;" and
"Qualified patient."

B. The following phrases, when used in this article, shall be construed as defined below. Words and phrases not defined here shall be construed as defined in Sections 11.01, 12.03, 45.19.5, 45.21, and 56.45 of this Code.

“Location.” The lot or portion of a lot that is used by a medical marijuana collective.

“Medical marijuana.” Marijuana used for medical purposes in accordance with California Health and Safety Code Section 11362.5

“Medical marijuana collective (“collective”).” An incorporated or unincorporated association, composed solely of four or more qualified patients, persons with identification cards, and designated primary caregivers of qualified patients and persons with identification cards (collectively referred to as “members”) who associate at a particular location to collectively or cooperatively cultivate marijuana for medical purposes, in strict accordance with California Health and Safety Code Sections 11362.5, *et seq.*

“Member engaged in the management.” A member with responsibility for the establishment, organization, registration, supervision, or oversight of the operation of a collective, including but not limited to members who perform the functions of president, vice president, director, operating officer, financial officer, secretary, treasurer, or manager of the collective.

SEC. 45.19.6.2. REGISTRATION.

A. Registration Required. No collective shall operate until after it has filed a registration form in accordance with the provisions of this article, has paid any adopted registration fee, and its registration has been accepted as complete by the Department of Building and Safety.

B. Preinspection and Certificate of Occupancy Required. Prior to filing a registration form with the Department of Building and Safety, a collective shall provide plans of the collective location including details of any proposed alterations and a radius map signed by an architect or civil engineer licensed in the State of California to show compliance with the standards set forth in Section 45.19.6.3 A of this article and compliance with Chapters I and IX of the Code for the new agricultural occupancy. A collective shall obtain a written preinspection report from the Department of Building and Safety after the Department verifies the accuracy of the plans and radius map submitted and performs all required research (planning/zoning records). A preinspection fee pursuant to Section 91.107.3.2 of this Code, plus a research fee for a minimum of three hours of time pursuant to Section 98.0415 (f) of this Code, shall be paid to the Department of Building and Safety at the time of a request for preinspection. The Department of Building and Safety shall submit its written preinspection report to the collective stating any conditions that must be met or permits that must be obtained in order to accomplish the required building alterations and to change the occupancy of the building. If the preinspection report finds noncompliance of the location or of the proposed alterations with the standards set forth in Section 45.19.6.3 A of this article or Chapters I and IX of this Code, a subsequent preinspection may be required, for which an additional preinspection fee shall be paid.

C. Location Priority Status. Upon issuance of: (1) a written preinspection report by the Department of Building and Safety verifying that the proposed location complies with Sections 45.19.6.3 A.2 and A.3 of this article, and (2) all required building permits if the preinspection report specifies alterations, the collective shall obtain priority status for that location. This priority status shall become invalid if the building permits are revoked or expire. During the time that the location priority status is valid, no preinspection for another collective shall be conducted or approved if its location conflicts under the provisions of this article with the location that has priority status.

D. Notice of Preinspection. Prior to accepting a request for preinspection, the Department of Building and Safety shall require proof that the collective has provided written notice to the City Council member and the Certified Neighborhood Council representing the area in which the collective is located, of: the preinspection request, the location of the collective, a telephone number at the location, the name, telephone number, and address of a person authorized to accept service of process for the collective, and the name(s), telephone number(s), and address(es) of each member engaged in the management of the collective. This notification shall be sent by certified mail, postage prepaid, and return receipt requested.

E. Registration Form. Upon receipt of a Department of Building and Safety preinspection report and a Certificate of Occupancy verifying compliance with the standards set forth in Section 45.19.6.3 A of this article, the collective shall file a registration form with the Department of Building and Safety. The registration form shall require the following accurate and truthful information: the address and physical description (e.g., one-story commercial building, etc.) of the location at and upon which the collective is located; a telephone number at the location; the name, telephone number, and address of a person authorized to accept service of process for the collective; the name(s), telephone number(s), and address(es) of each member engaged in the management of the collective; and any other information reasonably required to show that the collective complies with this article. In addition, the registration form shall confirm the consent by the collective, without requirement for a search warrant, subpoena or court order, for the inspection and copying by the Police Department of the recordings and records required to be maintained under Sections 45.19.6.3 B.1 and 45.19.6.4 of this article.

The collective shall file an updated registration form quarterly, but only if there were changes during the previous quarter to any of the information provided in the initial registration form or any change in status of compliance with the regulations set forth in Section 45.19.6.3. A change of location cannot be accomplished by an updated registration form, but shall instead require a new preinspection and registration. Each and every member who is engaged in the management of the collective shall print his or her name and sign the initial registration form and any subsequent updated registration form, under penalty of perjury certifying that all information contained in the registration form is true and correct. It shall be the sole responsibility of the members engaged in the management of the collective to ensure that all forms and documents are submitted

as required by this article and that the information provided is accurate, complete and timely submitted.

F. Additional Registration Documents. As attachments to the original and any subsequently updated registration form, the collective shall provide to the Department of Building and Safety: (1) proof that the property owner of the location, and landlord if applicable, was given written notice sent by certified mail, postage prepaid, and return receipt requested that the collective intends to file the registration form and that the owner of the location, and landlord if applicable, has received a copy of the information contained in the registration form; (2) for each member engaged in the management of the collective, a fully legible copy of one government-issued form of identification, such as a social security card, a state driver's license or identification card, or a passport; and (3) the collective's Certificate of Occupancy for the cultivation use.

G. Completed Registration. The Department of Building and Safety shall mail proof of a completed registration and any subsequent updated registration to the person authorized to accept service of process on behalf of the collective and to the owner of the location.

H. Registration Null and Void. A registration accepted as complete under this article shall become null and void upon the cessation of marijuana cultivation at the location for 90 days or longer, upon the relocation of the collective to a different location, or upon a violation by the collective or any of its members of a provision of this article.

SEC. 45.19.6.3. REGULATIONS.

The location at or upon which a collective cultivates and provides medical marijuana to its members must meet the following requirements:

A. Preinspection Requirements.

1. The location shall comply with the provisions of Chapters I and IX of the Code, including as they pertain to the agricultural marijuana cultivation use. Permits for a change of use, any alterations to the building, and a Certificate of Occupancy shall be obtained from the Department of Building and Safety;
2. No collective shall abut or be located across the street or alley from or have a common corner with a lot improved with an exclusively residential building;
3. No collective shall be located within a 1,000-foot radius of a school, public park, public library, religious institution, licensed child care facility, youth center, hospital, medical facility, substance abuse rehabilitation center, or other medical marijuana collective(s). The distance specified in this subdivision shall be the horizontal distance measured in a straight line from the property line of the

school, public park, public library, religious institution, licensed child care facility, youth center, hospital, medical facility, substance abuse rehabilitation center, or other medical marijuana collective(s), to the closest property line of the lot on which the collective is located without regard to intervening structures;

4. Exterior building lighting and parking area lighting for the location must be in compliance with Sections 93.0104, 93.0107 and 93.0117 of the Code. In addition, the location shall be equipped with lighting fixtures of sufficient intensity to illuminate all interior areas of the lot with an illumination of not less than 1.5 foot-candles evenly distributed as measured at floor level;

5. Any exterior signs and any interior signs visible from the exterior shall be unlighted;

6. Windows and roof hatches of the building or portion of the building where the collective is located shall be secured from the inside with bars so as to prevent unauthorized entry, and shall be equipped with latches that may be released quickly from the inside to allow exit in the event of emergency in compliance with all applicable building code provisions;

7. Exterior doors to the collective shall remain locked from the outside to prevent unauthorized ingress to the premises of the collective. Ingress shall be allowed by means of a remote release operated from within the premises of the collective. In all cases, doors shall remain openable from the inside to allow egress without the use of a key or special knowledge. If installed, access-controlled egress doors shall comply with Section 1008.1.3.4 of the California Building Code; and

8. A sign shall be posted in a conspicuous location inside the structure at the location advising: "This collective is registered in accordance with the laws of the City of Los Angeles. The sale of marijuana and the diversion of marijuana for non-medical purposes are violations of State law. The use of marijuana may impair a person's ability to drive a motor vehicle or operate heavy machinery. Loitering at the location of a medical marijuana collective for an illegal purpose is prohibited by California Penal Code Section 647(h)."

B. Conditions of Operation.

1. The location shall be monitored at all times by web-based closed-circuit television for security purposes. The camera and recording system must be of adequate quality, color rendition and resolution to allow the ready identification of any individual committing a crime anywhere on or adjacent to the location. The recordings shall be maintained for a period of not less than ninety (90) days and shall be made available by the collective to the Police Department upon request.

2. The location shall have a centrally-monitored fire and burglar alarm system and the building or the portion of the building where the collective is located shall contain a fire-proof safe;

3. No cultivation of medical marijuana at the location shall be visible with the naked eye from any public or other private property, nor shall cultivated marijuana or dried marijuana be visible from the building exterior. No cultivation shall occur at the location unless the area devoted to the cultivation is secured from public access by means of a locked gate and any other security measures necessary to prevent unauthorized entry;

4. No manufacture of concentrated cannabis in violation of California Health and Safety Code section 11379.6 is allowed;

5. No collective shall be open or provide medical marijuana to its members between the hours of 8:00 p.m. and 10:00 a.m. This prohibition shall not apply to a qualified patient's use of marijuana for his or her own medical needs if the qualified patient's permanent legal residence is the location;

6. No sale of marijuana or of products containing marijuana shall be allowed, nor shall the manufacture of marijuana products for sale be permitted;

7. No persons under the age of eighteen shall be allowed at the location, unless that minor is a qualified patient or person with an identification card and accompanied by his or her licensed attending physician, parent or documented legal guardian;

8. No medical marijuana collective shall possess more than 5 pounds of dried marijuana or more than 100 plants of any size at the location. No collective shall possess or provide marijuana other than marijuana that was cultivated by the collective: (a) at the location; or (b) at the collective's previous location if that previous location was registered and operated in strict accordance with this article;

9. The light fixtures required in Section 45.19.6.3 A.4, above, shall be turned on from dusk to dawn;

10. No collective may provide medical marijuana to any persons other than its members who participate in the collective cultivation of marijuana at or upon the location of that collective. No medical marijuana provided to a primary caregiver may be supplied to any person(s) other than the primary caregiver's qualified patient(s) or person(s) with an identification card;

11. No collective shall cause or permit the sale, dispensing, or consumption of alcoholic beverages at the location or in the parking area of the location;

12. No dried medical marijuana shall be stored in buildings that are not completely enclosed, or stored in an unlocked vault or safe, or other unsecured storage structure; nor shall any dried medical marijuana be stored in a safe or vault that is not bolted to the floor or structure of the facility;

13. Medical marijuana may not be inhaled, smoked, eaten, ingested, or otherwise consumed at the location, in the parking areas of the location, or in those areas restricted under the provisions of California Health and Safety Code Section 11362.79. This prohibition shall not apply to a qualified patient's use of marijuana for his or her own medical needs if the qualified patient's permanent legal residence is the location; and

14. Only members of the collective may be engaged in the management of the collective. A person who has been convicted within the previous 10 years of a felony or a crime of moral turpitude, or who is currently on parole or probation for the sale or distribution of a controlled substance, shall not be engaged directly or indirectly in the management of the collective and, further, shall not manage or handle the receipts and expenses of the collective.

15. Nothing in this article shall prevent members engaged in the collective cultivation of medical marijuana in strict accordance with this article from sharing the actual, out-of-pocket costs of their collective cultivation. Actual, out-of-pocket costs shall not be recovered through the sale of marijuana. Nothing in this article shall pertain to or affect the reimbursements from qualified patients to their primary caregivers pursuant to California Health and Safety Code Section 11362.765.

SEC. 45.19.6.4. MAINTENANCE OF RECORDS.

A medical marijuana collective shall maintain records at the location accurately and truthfully documenting: (1) the full name, address, and telephone number(s) of the owner, landlord and/or lessee of the location; (2) the full name, address, and telephone number(s) of all members who are engaged in the management of the collective and the exact nature of each member's participation in the management of the collective; (3) the full name, address, and telephone number(s) of all members who participate in the collective cultivation, the date they joined the collective and the exact nature of each member's participation; (4) the full name, address, and telephone number(s) of members to whom the collective provides medical marijuana; (5) each member's status as a qualified patient, person with an identification card, or designated primary caregiver; (6) all contributions, whether in cash or in kind, by the members to the collective and all expenditures incurred by the collective for the cultivation of medical marijuana; (7) an inventory record documenting the dates and amounts of marijuana cultivated at the location, including the amounts of marijuana stored at the location at any given time; and (8) proof of registration with the Department of Building and Safety in conformance with Section 45.19.6.2 of this article, including evidence of an accepted

registration form. These records shall be maintained by the collective for a period of five years and shall be made available by the collective to the Police Department upon request. In addition to all other formats that the collective may maintain, these records shall be stored by the collective at the location in a printed format in its fire-proof safe. Any loss, damage or destruction of the records shall be reported to the Department of Building and Safety within 24 hours of the loss, destruction or damage.

SEC. 45.19.6.5. INSPECTION AND ENFORCEMENT RESPONSIBILITIES.

The Department of Building and Safety may enter and inspect the location of any collective between the hours of 10:00 a.m. and 8:00 p.m., or at any reasonable time, to ensure compliance with Section 45.19.6.3 A of this article. In addition, the Police Department may enter and inspect the location of any collective and the recordings and records maintained pursuant to Sections 45.19.6.3 and 45.19.6.4 of this article between the hours of 10:00 a.m. and 8:00 p.m., or at any reasonable time, to ensure compliance with Sections 45.19.6.2, 45.19.6.3 B, 45.19.6.4, 45.19.6.6, 45.19.6.7 and 45.19.6.8 of this article. It is unlawful for any owner, landlord, lessee, member (including but not limited to a member engaged in the management), or any other person having any responsibility over the operation of the collective to refuse to allow, impede, obstruct or interfere with an inspection, review or copying of records and closed-circuit monitoring authorized and required under this article, including but not limited to, the concealment, destruction, and falsification of any recordings, records, or monitoring.

SEC. 45.19.6.6. EXISTING MEDICAL MARIJUANA OPERATIONS.

Any existing medical marijuana collective, dispensary, operator, establishment, or provider that does not comply with the requirements of this article must immediately cease operation until such time, if any, when it complies fully with the requirements of this article; except that any medical marijuana collective, dispensary, operator, establishment, or provider not in compliance with the requirements of this article that (1) was established and operating at its current location prior to September 14, 2007, and (2) registered pursuant to Interim Control Ordinance No. 179,027 with the City Clerk's office before November 12, 2007, shall immediately cease any sales of marijuana or product containing marijuana and shall thereafter have 180 days from the effective date of this article during which to fully comply with the requirements of this article or to cease operation. No medical marijuana collective, dispensary, operator, establishment, or provider that existed prior to the enactment of this article shall be deemed to be a legally established use under the provisions of this article, and such medical marijuana collective, dispensary, operator, establishment, or provider shall not be entitled to claim legal nonconforming status.

SEC. 45.19.6.7. COMPLIANCE WITH THIS ARTICLE AND STATE LAW.

A. It is unlawful for any person to cause, permit or engage in the cultivation, possession, distribution or giving away of marijuana for medical purposes except as provided in this article, and pursuant to any and all other applicable local and state laws.

B. It is unlawful for any person to cause, permit or engage in any activity related to medical marijuana except as provided in Health and Safety Code Sections 11362.5 *et seq.*, and pursuant to any and all other applicable local and state laws.

C. It is unlawful for any person to knowingly make any false, misleading or inaccurate statements or representations in any forms, records, filings or documentation required to be maintained, filed or provided to the City under this article, or to any other local, state or federal government agency having jurisdiction over any of the activities of collectives.

SEC. 45.19.6.8. VIOLATION AND ENFORCEMENT.

Each and every violation of this article shall constitute a separate violation and shall be subject to all remedies and enforcement measures authorized by Section 11.00 of this Code. Additionally, as a nuisance *per se*, any violation of this article shall be subject to injunctive relief, revocation of the certificate of occupancy for the location, disgorgement and payment to the City of any and all monies unlawfully obtained, costs of abatement, costs of investigation, attorney fees, and any other relief or remedy available at law or equity. The City may also pursue any and all remedies and actions available and applicable under local and state laws for any violations committed by the collective and persons related or associated with the collective.

Notwithstanding an initial verification of compliance by the collective with the preinspection requirements set forth in Section 45.19.6.3 A of this article prior to the filing of the registration form, any collective later found to be in violation of any of the preinspection requirements at any time is subject to the enforcement provisions provided in this section.

Sec. 2. Section 91.107.3.2 of the Los Angeles Municipal Code is amended by adding a new item 5 to read:

5. Medical Marijuana Collective Preinspection. A preinspection fee pursuant to Section 45.19.6.2 B of the Los Angeles Municipal Code shall be collected by the Department to verify compliance with Section 49.19.6.3 A of the Los Angeles Municipal Code. The preinspection fee shall be in addition to any other fee that the Department determines is necessary due to the nature of the work involved.

Sec. 3. **Operative Date.** No preinspection pursuant to Section 45.19.6.2 B of the Los Angeles Municipal Code shall be conducted by the Department of Building and Safety, nor shall a registration form pursuant to Section 45.19.6.2 A of the Los Angeles Municipal Code be accepted by the Department of Building and Safety for a period of 180 days from the effective date of this ordinance; except that any medical marijuana collective, dispensary, operator, establishment, or provider that was (1) established and operating at its current location prior to September 14, 2007, and (2) registered pursuant to Interim Control Ordinance No. 179,027 with the City Clerk's office before

November 12, 2007, may have a preinspection done by the Department of Building and Safety and may file a registration form with the Department of Building and Safety during this 180 day period.

Sec. 4. **Severability.** Pursuant to the provisions of Los Angeles Municipal Code Section 11.00 (k), if any provision of this ordinance is found to be unconstitutional or otherwise invalid by any court of competent jurisdiction, that invalidity shall not affect the remaining provisions of this ordinance which can be implemented without the invalid provision, and, to this end, the provisions of this ordinance are declared to be severable.

Sec. 5. The City Clerk shall certify to the passage of this ordinance and have it published in accordance with Council policy, either in a daily newspaper circulated in the City of Los Angeles or by posting for ten days in three public places in the City of Los Angeles: one copy on the bulletin board located at the Main Street entrance to the Los Angeles City Hall; one copy on the bulletin board located at the Main Street entrance to the Los Angeles City Hall East; and one copy on the bulletin board located at the Temple Street entrance to the Los Angeles County Hall of Records.

I hereby certify that this ordinance was passed by the Council of the City of Los Angeles, at its meeting of _____.

JUNE LAGMAY, City Clerk

By _____ Deputy

Approved _____

Mayor

Approved as to Form and Legality

CARMEN A. TRUTANICH, City Attorney

By 

SHARON SIEDORF CARDENAS
Assistant City Attorney

Date: NOV 13 2009

File No. CF 08-0923

Bans on Medical Marijuana Facilities

California Cities

Anaheim	Fresno	Modesto	Roseville
Antioch	Fullerton	Montclair	San Bernardino
Arroyo Grande	Garden Grove	Monterey Park	San Jacinto
Auburn	Gardena	Moorpark	San Juan Capistrano
Azusa	Grand Terrace	Murrieta	San Leandro
Brentwood	Grover Beach	Nevada City	San Luis Obispo
Buellton	Hawthorne	Newark	San Marcos
Buena Park	Healdsburg	Norco	San Pablo
Ceres	Hercules	Oakdale	San Rafael
Chino	Hermosa Beach	Oakley	Santa Ana
Claremont	Hesperia	Ontario	Seal Beach
Cloverdale	Huntington Beach	Palm Desert	Santa Maria
Clovis	Indian Wells	Palos Verdes Estates*	Santa Monica
Colma	Indio	Pasadena	Seaside
Concord	Inglewood	Paso Robles	Simi Valley
Corona	Laguna Hills	Patterson	Solvang
Costa Mesa	La Mirada	Petaluma	South San Francisco
Cypress	La Palma	Pico Rivera	Susanville
Davis	La Quinta	Pinole	Temecula
Desert Hot Springs	Lake Elsinore	Pismo Beach	Torrance
Dixon	Lake Forest	Pittsburgh	Turlock
Dublin	Lawndale	Placentia	Tustin
El Cerrito	Livermore	Pleasant Hill	Ukiah
Emeryville	Lincoln	Pleasanton	Union City
Escondido	Lompoc	Red Bluff	Upland
Fairfield	Los Banos	Redondo Beach	Ventura
Folsom	Manhattan Beach	Ridgecrest	Vista
Fontana	Marina	Riverbank	Willits
Fortuna	Merced	Riverside	Windsor
Fremont	Mission Viejo	Rocklin	Yuba City
		Rohnert Park	Yucaipa

California Counties

Amador	Contra Costa*	El Dorado	Madera
Merced	Riverside	Stanislaus	Sutter

* Ban allows one facility to remain open

SOURCE: Americans for Safe Access (ASA) website, Local California Dispensary Regulations, *available at* <http://www.safeaccessnow.org/article.php?id=3165> (last visited November 6, 2009).

Moratoriums on Medical Marijuana Facilities

California Cities

Adelanto	Colfax	Loma Linda	Sacramento
Alameda	Colton	Loomis	Salinas
Aliso Viejo	Corning	Marin City	San Dimas
American Canyon	Chula Vista	Menifee	San Fernando
Anderson	Escondido	Mill Valley	Santee
Arcata	Galt	Moreno Valley	Sausalito
Atascadero	Goleta	Morgan Hill	Shasta Lake
Baldwin Park	Grass Valley	Morro Bay	Signal Hill
Barstow	Guadalupe	Napa	South Gate
Beaumont	Hemet	National City	Tehachapi
Benicia	Highland	Oceanside	Temple City
Blythe	Imperial Beach	Orange	Vacaville
Brea	La Habra	Orinda	Victorville
Calimesa	La Puente	Perris	Walnut Creek
Camarillo	Lafayette	Porterville	Watsonville
Carpinteria	Laguna Beach	Rancho Cordova	West Sacramento
Carson	Laguna Niguel	Rancho Cucamonga	Westlake Village
Coachella	Lodi	Rosemead	Woodland
			Yucca Valley

California Counties

Lake	Madera	Nevada	San Bernardino
San Diego	Tehama	Tulare	

SOURCE: Americans for Safe Access (ASA) website, Local California Dispensary Regulations, available at <http://www.safeaccessnow.org/article.php?id=3165> (last visited November 6, 2009).

Authorized California Medical Marijuana Facilities

JURISDICTION	POP	SQ MILES	# AUTHORIZED
Albany	17,000	1.7	Cap of 1
Atascadero	26,411	26.7	Cap of 1
Angels Camp	3,150	3	Cap of 1
Berkeley	105,385	10.5	Cap of 3
Cotati	7,170	1.89	Cap of 1
Citrus Heights	87,017	14.3	Cap of 1
Diamond Bar	58,730	15	Cap of 1
Elk Grove	141,430	42.1	0
Fort Bragg	7,026	2.8	0
Jackson	4,317	3.5	Cap of 1
Laguna Woods	18,500	4	0
Malibu	12,575	100.96	Cap of 2
Martinez	35,866	13.5	0
Oakland	420,813	78.2	Cap of 4
Palm Springs	42,350	95.1	Cap of 2
Plymouth	1,050	0.9	Cap of 1
Ripon	14,575	4.2	0
Sebastopol	7,774	1.88	Cap of 2
San Francisco	808,976	231.92	23
San Jose	948,279	461.5	0
Santa Barbara	89,465	41.4	5
Santa Cruz	56,124	15.6	2
Santa Rosa	161,496	104.6	1
Selma	19,444	4.3	0
Sutter Creek	2,945	1.7	0
Tulare	55,935	16.7	2
Visalia	123,670	28.6	0
West Hollywood	34,675	1.9	Cap of 7
Whittier	83,680	14.8	0

SOURCES

ALBANY: City Ordinance 07-01; <http://www.albanyca.org/index.aspx?page=57>
ATASCADERO: City Ord. 494, § 5-12.106; http://en.wikipedia.org/wiki/Atascadero,_California
ANGELS CAMP: City Ord. 410, § 8.25.040(C) - (D); <http://www.angelscamp.com/index.html>;
* http://en.wikipedia.org/wiki/Angels_Camp,_California
BERKELEY: Ordinance N.S., § 12.26.110;
<http://www.ci.berkeley.ca.us/ContentDisplay.aspx?id=7164>
COATI: City Ord. 787, § 8.24.070 (1); http://en.wikipedia.org/wiki/Cotati,_California
CITRUS HEIGHTS: City Ord. 2004-06 § 47-4 (E); <http://www.ci.citrus-heights.ca.us/home/index.asp?page=907>;
* http://en.wikipedia.org/wiki/Citrus_Heights,_California
DIAMOND BAR: Ord. No. 04 (2006); <http://www.ci.diamond-bar.ca.us/Index.aspx?page=85>
ELK GROVE: City Planning Dept. <http://www.elkgrovecity.org/community/about-elk-grove.asp>
FORT BRAGG: City Planning Dept. http://en.wikipedia.org/wiki/Fort_Bragg,_California
JACKSON: City Ord. 640, § 8.25.040 (D); http://en.wikipedia.org/wiki/Jackson,_California
LAGUNA WOODS: City Manager's Office;
<http://www.lagunawoodscity.org/article.cfm?id=265>
MALIBU: Ord. 328, § 17.66.120 (B) (16);
<http://www.ci.malibu.ca.us/index.cfm/fuseaction/nav/navid/3/>;
* http://en.wikipedia.org/wiki/Malibu,_California
MARTINEZ: City Planning Division; http://en.wikipedia.org/wiki/Martinez,_California
OAKLAND: Ord. 12585; http://en.wikipedia.org/wiki/Oakland,_California
PALM SPRINGS: Ord. No. 1758; http://en.wikipedia.org/wiki/Palm_Springs,_California
PLYMOUTH: Ord. 2004-02, § 8.15.040 (D); http://en.wikipedia.org/wiki/Plymouth,_Ca
RIPON: City Police Department; http://en.wikipedia.org/wiki/Ripon,_Ca
SEBASTOPOL: Ord. No. 1004, § 17.140.080; http://en.wikipedia.org/wiki/Sebastopol,_ca
SAN FRANCISCO: City Planning & Health Dept.;
http://en.wikipedia.org/wiki/San_francisco,_ca
SAN JOSE: City Planning Dept. Municipal Code; http://en.wikipedia.org/wiki/San_jose,_ca
SANTA BARBARA: City Planning Department; http://en.wikipedia.org/wiki/Santa_barbara,_ca
SANTA CRUZ: City of Santa Cruz; http://en.wikipedia.org/wiki/Santa_cruz,_ca
SANTA ROSA: City Manager's Office; http://en.wikipedia.org/wiki/Santa_Rosa,_CA
SELMA: City Planning Department; http://en.wikipedia.org/wiki/Selma,_CA
SUTTER CREEK: City Administration. ; http://en.wikipedia.org/wiki/Sutter_Creek,_Ca
TULARE: City Planning Department; http://en.wikipedia.org/wiki/Tulare,_Ca
VISALIA: City Business Licensing Department; http://en.wikipedia.org/wiki/Visalia,_Ca
WEST HOLLYWOOD: City Ordinance No. 05-716U § 7.32.030;
http://en.wikipedia.org/wiki/West_Hollywood,_CA
WHITTIER: City Administration; http://en.wikipedia.org/wiki/Whittier,_Ca

Information listed in this chart was verified via telephone by Frank Rodriguez,
CORO Fellow, Los Angeles City Attorney's Office, November 2- 10, 2009



Medical Use of Marijuana. Initiative Statute.

Official Title and Summary prepared by the
Attorney General

Text of Proposition

MEDICAL USE OF MARIJUANA. INITIATIVE STATUTE.

- Exempts patients and defined caregivers who possess or cultivate marijuana for medical treatment recommended by a physician from criminal laws which otherwise prohibit possession or cultivation of marijuana.
- Provides physicians who recommend use of marijuana for medical treatment shall not be punished or denied any right or privilege.
- Declares that measure not be construed to supersede prohibitions of conduct endangering others or to condone diversion of marijuana for non-medical purposes.
- Contains severability clause.

Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:

- Adoption of this measure would probably have no significant fiscal impact on state and local governments.
-

Argument in Favor of Proposition 215

Arguments on this page are the opinions of the authors and have not been checked for accuracy by any official agency.

PROPOSITION 215 HELPS TERMINALLY ILL PATIENTS

Proposition 215 will allow seriously and terminally ill patients to legally use marijuana, if, and only if, they have the approval of a licensed physician.

We are physicians and nurses who have witnessed firsthand the medical benefits of marijuana. *Yet today in California, medical use of marijuana is illegal.* Doctors cannot prescribe marijuana, and terminally ill patients must break the law to use it.

Marijuana is not a cure, but it can help cancer patients. Most have severe reactions to the disease and chemotherapy--commonly, severe nausea and vomiting. One in three patients discontinues treatment despite a 50% chance of improvement. When standard anti-nausea drugs fail, marijuana often eases patients' nausea and permits continued treatment. It can be either smoked or baked into foods.

MARIJUANA DOESN'T JUST HELP CANCER PATIENTS

University doctors and researchers have found that marijuana is also effective in: lowering internal eye pressure associated with glaucoma, slowing the onset of blindness; reducing the pain of AIDS patients, and stimulating the appetites of those suffering malnutrition because of AIDS 'wasting syndrome'; and alleviating muscle spasticity and chronic pain due to multiple sclerosis, epilepsy, and spinal cord injuries.

When one in five Americans will have cancer, and 20 million may develop glaucoma, shouldn't our government let physicians prescribe any medicine capable of relieving suffering?

The federal government stopped supplying marijuana to patients in 1991. Now it tells patients to take Marinol, a synthetic substitute for marijuana that can cost \$30,000 a year and is often less reliable and less effective.

Marijuana is not magic. But often it is the only way to get relief. A Harvard University survey found that almost one-half of cancer doctors surveyed would prescribe marijuana to some of their patients if it were legal.

Rebuttal to Argument Against Proposition 215

Arguments on this page are the opinions of the authors and have not been checked for accuracy by any official agency.

SAN FRANCISCO DISTRICT ATTORNEY TERENCE HALLINAN SAYS . . .

Opponents aren't telling you that law enforcement officers are on both sides of Proposition 215. I support it because I don't want to send cancer patients to jail for using marijuana.

Proposition 215 does not allow "unlimited quantities of marijuana to be grown anywhere." It only allows marijuana to be grown for a patient's personal use. Police officers can still arrest anyone who grows too much, or tries to sell it.

Proposition 215 doesn't give kids the okay to use marijuana, either. Police officers can still arrest anyone for marijuana offenses. Proposition 215 simply gives those arrested a defense in court, *if they can prove they used marijuana with a doctor's approval.*

ASSEMBLYMAN JOHN VASCONCELLOS SAYS . . .

Proposition 215 is based on a bill I sponsored in the California Legislature. It passed both houses with support from both parties, but was vetoed by Governor Wilson. If it were the kind of irresponsible legislation that opponents claim it was, it would not have received such widespread support.

CANCER SURVIVOR JAMES CANTER SAYS . . .

Doctors and patients should decide what medicines are best. Ten years ago, I nearly died from testicular cancer that spread into my lungs. Chemotherapy made me sick and nauseous. The standard drugs, like Marinol, didn't help.

Marijuana blocked the nausea. As a result, I was able to continue the chemotherapy treatments. Today I've beaten the cancer, and no longer smoke marijuana. I credit marijuana as part of the treatment that saved my life.

TERENCE HALLINAN
San Francisco District Attorney



4 of 17 DOCUMENTS

THE PEOPLE, Plaintiff and Respondent, v. ROGER WILLIAM MENTCH, Defendant and Appellant.

S148204

SUPREME COURT OF CALIFORNIA

45 Cal. 4th 274; 195 P.3d 1061; 85 Cal. Rptr. 3d 480; 2008 Cal. LEXIS 13630

November 24, 2008, Filed

NOTICE: As modified Dec. 17, 2008.

SUBSEQUENT HISTORY: Reported at *People v. Mentch (Roger William)*, 2008 Cal. LEXIS 13967 (Cal., Nov. 24, 2008)

Modified by *People v. Mentch (Roger William)*, 2008 Cal. LEXIS 13924 (Cal., Dec. 17, 2008)

Motion denied by *People v. Mentch*, 2009 Cal. LEXIS 1578 (Cal., Feb. 25, 2009)

PRIOR HISTORY:

Court of Appeal Sixth Appellate District, No. H028783. Superior Court of Santa Cruz County, No. 07429, Samuel S. Stevens, Judge.

People v. Mentch, 143 Cal. App. 4th 1461, 50 Cal. Rptr. 3d 91, 2006 Cal. App. LEXIS 1623 (Cal. App. 6th Dist., 2006)

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A jury convicted defendant of cultivation and possession for sale of marijuana. Defendant had a medical marijuana recommendation. Defendant testified that he grew medical marijuana for several qualified patients, that he counseled them on its use, that he accompanied them to medical appointments on a sporadic basis, and that he occasionally grew too much and sold the excess to marijuana clubs. The trial court found the evidence insufficient to establish primary caregiver status under *Health & Saf. Code*, § 11362.5, *subs. (d), (e)*. The trial court gave a medical marijuana instruction regarding a qualified patient defense but omitted the optional portion of *CALJIC No. 12.24.1* relating to the primary caregiver defense. (Superior Court of Santa Cruz County, No.

07429, Samuel S. Stevens, Judge.) The Court of Appeal, Sixth Dist., No. H028783, reversed.

The Supreme Court reversed the judgment of the Court of Appeal. The court held that primary caregiver status requires proof that a defendant (1) consistently provided caregiving, (2) independent of any assistance in taking medical marijuana, (3) at or before the time he or she assumed responsibility for assisting with medical marijuana. Defendant did not qualify because he was not a consistent caregiver, and he had no defense as to the excess amount he sold. Moreover, defendant was not entitled to immunity under *Health & Saf. Code*, § 11362.765, because he went beyond the immunized range of conduct. (Opinion by Werdegar, J., with George, C. J., Kennard, J., Baxter, J., Chin, J., Moreno, J., and Corrigan, J., concurring. Concurring opinion by Chin, J., with Corrigan, J., concurring (see p. 292).) [*275]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Statutes § 19--Construction--Initiative Measures.-- Courts interpret voter initiatives using the same principles that govern construction of legislative enactments. Thus, a court begins with the text as the first and best indicator of intent. If the text is ambiguous and supports multiple interpretations, the court may then turn to extrinsic sources such as ballot summaries and arguments for insight into the voters' intent.

(2) Drugs and Narcotics § 21--Offenses--Defenses--Medical Marijuana--Primary Caregiver.--The statutory definition in *Health & Saf. Code*, § 11362.5, *subd. (e)*, has two parts: (1) a primary caregiver must have

been designated as such by the medicinal marijuana patient; and (2) he or she must be a person who has consistently assumed responsibility for the housing, health, or safety of the patient. It is clear from the structure of § 11362.5, *subd. (e)*, that this latter part of the definition has additional restrictive power, or else the subdivision would have ended with the phrase "by the person exempted under this section," thereby allowing every patient to designate one person without limitation. Thus, to qualify for exemption under this subdivision, a person must satisfy both halves--the designee clause and the responsibility clause. Designation is necessary, but not sufficient.

(3) Drugs and Narcotics § 21--Offenses--Defenses--Medical Marijuana--Primary Caregiver.--A defendant asserting primary caregiver status must prove at a minimum that he or she (1) consistently provided caregiving, (2) independent of any assistance in taking medical marijuana, (3) at or before the time he or she assumed responsibility for assisting with medical marijuana.

(4) Criminal Law § 247--Trial--Instructions--Defendant's View of Case--Affirmative Defense.--A defendant has a right to have the trial court give a jury instruction on any affirmative defense for which the record contains substantial evidence--evidence sufficient for a reasonable jury to find in favor of the defendant--unless the defense is inconsistent with the defendant's theory of the case. In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt. [*276]

(5) Drugs and Narcotics § 21--Offenses--Defenses--Medical Marijuana--Primary Caregiver.--Defendant relied almost exclusively on the provision of medical marijuana to establish a primary caregiving relationship under *Health & Saf. Code, § 11362.5, subds. (d), (e)*. But the evidence must establish an assumption of responsibility independent of the provision of medical marijuana. This shortcoming was also intertwined with defendant's problems showing a consistent assumption of responsibility: what caregiving was consistent consisted only of providing marijuana, while what caregiving was independent of providing marijuana was not consistent. There was a final overarching problem with the evidence. Defendant testified to providing marijuana to five patients and also to occasionally growing too much and providing the excess to marijuana clubs. But because defendant was charged with single counts of possession and cultivation, primary caregiver status would provide a

defense only if it extended to all the marijuana he possessed or cultivated.

[*Judicial Council of Cal. Criminal Jury Instructions (2008) CALCRIM No. 2375; Erwin et al., Cal. Criminal Defense Practice (2008) ch. 145, § 145.01.*]

(6) Criminal Law § 247--Trial--Instructions--Defendant's View of Case--Affirmative Defense.--The right to a jury resolution of all disputed factual issues is to be jealously protected. However, trial courts are still responsible for acting as gatekeepers and determining whether the evidence presented, considered in the light most favorable to the defendant, could establish an affirmative defense.

(7) Drugs and Narcotics § 21--Offenses--Defenses--Medical Marijuana--Immunities.--The Medical Marijuana Program (*Health & Saf. Code, § 11362.7 et seq.*) was passed in part to address issues not included in the Compassionate Use Act of 1996 (*Health & Saf. Code, § 11362.5*) so as to promote the fair and orderly implementation of the act and to clarify the scope of the application of the act (Stats. 2003, ch. 875, § 1). As part of its effort to clarify and smooth implementation of the act, the program immunizes from prosecution a range of conduct ancillary to the provision of medical marijuana to qualified patients (*Health & Saf. Code, § 11362.765*). While the program does convey additional immunities against cultivation and possession for sale charges to specific groups of people, it does so only for specific actions; it does not provide globally that the specified groups of people may never be [*277] charged with cultivation or possession for sale. That is, the immunities conveyed by § 11362.765 have three defining characteristics: (1) they each apply only to a specific group of people; (2) they each apply only to a specific range of conduct; and (3) they each apply only against a specific set of laws.

(8) Drugs and Narcotics § 21--Offenses--Defenses--Medical Marijuana--Immunities.--*Health & Saf. Code, § 11362.765, subd. (b)*, identifies both the groups of people who are to receive immunity and the sole basis, the range of their conduct, to which the immunity applies, while § 11362.765, *subd. (a)*, identifies the statutory provisions against which the specified people and conduct are granted immunity.

COUNSEL: Lawrence A. Gibbs, under appointment by the Supreme Court, and Joseph M. Bochner, under appointment by the Court of Appeal, for Defendant and Appellant.

Drug Policy Alliance, Daniel Abrahamson, Tamar Todd and Theshia Naidoo for Marcus A. Conant, Robert J.

Melamede and Gerald F. Uelmen as Amici Curiae on behalf of Defendant and Appellant.

Joseph D. Elford for Americans for Safe Access as Amicus Curiae on behalf of Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Donald E. de Nicola, Deputy State Solicitor General, Robert R. Anderson and Dane R. Gillette, Chief Assistant Attorneys General, Gerald A. Engler, Assistant Attorney General, Moona Nandi, Laurence K. Sullivan and Michele J. Swanson, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES: Opinion by Werdegar, J., with George, C. J., Kennard, Baxter, Chin, Moreno, and Corrigan, JJ., concurring. Concurring opinion by Chin, J., with Corrigan, J., concurring.

OPINION BY: Werdegar

OPINION

[**483] [**1063] **WERDEGAR, J.**--The Compassionate Use Act of 1996 (Act; *Health & Saf. Code, § 11362.5*, added by voter initiative, Prop. 215, Gen. Elec. (Nov. 5, 1996)) provides partial immunity for the possession and cultivation of marijuana to two groups of people: qualified medical marijuana patients and their primary caregivers. We consider here who may qualify as a primary caregiver. We hold that a defendant whose caregiving consisted principally of [*278] supplying marijuana and instructing on its use, and who otherwise only sporadically took some patients to medical appointments, cannot qualify as a primary caregiver under the Act and was not entitled to an instruction on the primary caregiver affirmative defense. We further conclude that nothing in the Legislature's subsequent 2003 Medical Marijuana Program (*Health & Saf. Code, § 11362.7 et seq.*) alters this conclusion or offers any additional defense on this record. Accordingly, we reverse the Court of Appeal.

FACTUAL AND PROCEDURAL BACKGROUND

In 2003, Roger William Mentch was arrested and charged with the cultivation of marijuana (*Health & Saf. Code, § 11358*)¹ [**1064] and its possession for sale (§ 11359).²

¹ All further unlabeled statutory references are to the Health and Safety Code.

² Mentch was also charged with manufacturing and possessing concentrated cannabis (also known as hash oil) (§§ 11357, *subd. (a)*, 11379.6, *subd. (a)*), possessing psilocybin mushrooms (§ 11377, *subd. (a)*), and firearm enhancements for

the marijuana and hash oil counts (*Pen. Code, § 12022, subd. (a)(1)*), but these additional counts have no bearing on the issues in this appeal, and we do not address them further.

Prosecution Evidence

Heidi Roth, a teller at Monterey Bay Bank, testified that she became familiar with Mentch over the period of February to April 2003. Mentch came to the bank on several occasions and made large deposits of cash in small bills, each deposit totaling over \$ 2,000. Roth noticed that some of the money Mentch deposited smelled so strongly of marijuana that the smell filled the bank, and the bank had to remove the money from circulation. The total amount Mentch deposited with the bank over a two-month period was \$ 10,750. On April 15, 2003, Roth filed a suspicious activity report with the Santa Cruz County [**484] Sheriff's Office, relating the questionable nature of Mentch's deposits.

After further investigation, the sheriff's office obtained a warrant to search Mentch's house for marijuana. On June 6, 2003, Mark Yanez, a narcotics investigator, and four deputies went to Mentch's house to serve the warrant. When Mentch opened the door, Yanez told him they had a warrant to search his house for marijuana. Mentch told Yanez that he had a medical recommendation for marijuana. A search of Mentch's person turned up \$ 253 in cash and a small vial of hash oil, or concentrated cannabis. Yanez advised Mentch of his rights and interviewed him in a police vehicle parked outside Mentch's residence. [*279]

Mentch told Yanez he had a medical marijuana recommendation for colitis, dysphoria, and depression, and that he smoked about four marijuana cigarettes, totaling approximately one-sixteenth of an ounce, per day for medicinal purposes. When Yanez asked Mentch if he sold marijuana, Mentch responded that he sold it to five medical marijuana users.

A search of Mentch's residence revealed several elaborate marijuana growing setups. In various rooms of the house, the deputies found 82 marijuana plants in the flowering or budding stage, 57 "clone" marijuana plants, 48 marijuana plants in the growing or vegetative stage, and three "mother" plants, which Yanez opined were likely the female plants from which clippings were taken to make the clone plants. Considering the evidence seized from Mentch's bank and residence, as well as his statement to Yanez, Yanez opined that while Mentch may have personally consumed some of the marijuana he grew, his operation was primarily a for-profit commercial venture.

Defense Evidence

Leland Besson testified that he had known Mentch for two years. In June 2003, Besson was on disability and had a medical marijuana recommendation for a bad back, neck, and joints. At the time, he was smoking approximately two to three grams of marijuana a day. For about one year before Mentch was arrested, Besson purchased his marijuana exclusively from Mentch, who knew about Besson's medical marijuana recommendation. Mentch supplied medical marijuana through his business, the Hemporium. Besson gave Mentch \$ 150 to \$ 200 in cash every month for one and one-half ounces of marijuana, the amount Besson usually consumed in a month.

Laura Eldridge testified she had known Mentch for about three years. In June 2003, she was working as a caretaker for Besson, cooking and cleaning for him, driving him to the grocery store, and driving him to medical appointments and to pick up his medications. Eldridge also drove Besson to Mentch's house to get him his marijuana. The only time Besson saw Mentch was when Eldridge took him to Mentch's house to get marijuana.

At the time, Eldridge herself had a medical marijuana recommendation for migraine headaches and post-traumatic stress disorder. She was smoking about five or six marijuana cigarettes a day and consuming about one [**1065] ounce of marijuana a month. Eldridge obtained marijuana exclusively from Mentch for approximately one and one-half years before his arrest. Mentch provided the marijuana through his medical marijuana business, the Hemporium. Eldridge obtained the marijuana from Mentch every month, paying him \$ 200 to \$ 250 [*280] in cash for one ounce and \$ 25 in cash for one-eighth of an ounce if she needed more.

[***485] Eldridge was at Mentch's house getting her daughter ready for school on the morning of Mentch's arrest. At the time, she and Mentch were not living together but were seeing each other romantically, and Eldridge had stayed over at Mentch's house the night before the search warrant was served.

Mentch took the stand in his own defense. In 2002, he obtained a medical marijuana recommendation and began growing marijuana. He learned how to grow marijuana from reading books, searching the Internet, and talking to people. He kept marijuana plants in all three stages of growth so that he was in a constant cycle of marijuana production, which produced a yield of four harvests a year. Mentch's medical marijuana recommendation was still current on the day the police searched his home. At that time, he smoked four to six marijuana cigarettes a day (approximately one-sixteenth of an ounce) and consumed between one and one-half to two ounces of marijuana a month.

Mentch opened the Hemporium, a caregiving and consultancy business, in March 2003. The purpose of the Hemporium was to give people safe access to medical marijuana. Mentch regularly provided marijuana to five other individuals, including Besson, Eldridge, and a man named Mike Manstock. Sometimes he did not charge them. All five individuals had valid medical marijuana recommendations. Mentch did not provide marijuana to anyone who did not have a medical marijuana recommendation. Occasionally, he took any extra marijuana he had to two different cannabis clubs, The Third Floor and another unnamed place. Although a majority of the marijuana plants in Mentch's home belonged to him, some belonged to Manstock. In addition, Mentch let Besson and Eldridge grow one or two plants.

Mentch provided marijuana to Besson about once every month and to Eldridge about once or twice every month. On average, they each gave him \$ 150 to \$ 200 for an ounce and a half of marijuana a month. Mentch considered his marijuana "high-grade" and provided it to Besson and Eldridge for less than street value. He used the money they paid him to pay for "nutrients, utilities, part of the rent." Mentch did not profit from his sales of marijuana, and sometimes he did not even recover his costs of growing it. Mentch counseled his patients/customers about the best strains of marijuana to grow for their ailments and the cleanest way to use the marijuana. He took a "couple of them" to medical appointments on a "sporadic" basis.

Although Mentch asked all five patients to come to court and testify on his behalf, only Besson and Eldridge showed up. He did not subpoena the others [*281] because one of them was out of state, another did not want to be involved because his father was an attorney, and the third did not want to testify.

The Primary Caregiver Defense

Before trial, the prosecutor filed a motion in limine to exclude any references by counsel during voir dire, testimony, or closing argument to Mentch's being a "primary caregiver" for Eldridge or Besson.³ The prosecutor asserted that Eldridge and Besson could testify to any care Mentch had provided them, but argued that the ultimate determination whether Mentch was a primary caregiver rested with the jury. The trial court granted the motion.

³ The Act extends limited immunity from state prosecution for cultivation or possession to both qualified patients and their designated "primary caregiver[s]." (§ 11362.5, *subd. (d)*.)

[***486] After Eldridge and Besson testified, the court concluded the evidence was insufficient to show

that Mentch had provided primary caregiver services. Mentch argued in a brief to the court that a person could qualify as a patient's primary caregiver whenever he or she consistently assumed responsibility for a patient's health by providing medical marijuana upon a doctor's recommendation or [**1066] approval. The trial court rejected the argument.

During the subsequent discussion of jury instructions after the close of evidence, Mentch requested the standard jury instruction for affirmative defenses under the Act (*CALJIC No. 12.24.1*) on the theory that he was both a qualified patient entitled to cultivate marijuana for himself and a primary caregiver entitled to cultivate marijuana and possess it for sale to others. The trial court agreed to give the instruction insofar as it articulated a qualified patient defense but, consistent with its prior rulings, omitted the optional portion of the instruction relating to the primary caregiver defense.⁴

4 At the time of trial, *CALJIC No. 12.24.1* provided: "The [possession] [or] [cultivation] [or] [transportation] of marijuana is not unlawful when the acts of [defendant] [a primary caregiver] are authorized by law for compassionate use. The [possession] [or] [cultivation] [or] [transportation] of marijuana is lawful (1) where its medical use is deemed appropriate and has been recommended or approved, orally or in writing, by a physician; (2) the physician has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief; [and] (3) the marijuana [possessed] [cultivated] [transported] was for the personal medical use of [the patient] [] [.] [; and] (4) the quantity of marijuana [[possessed] [or] [cultivated], and the form in which it was possessed were reasonably related to the [patient's] [] then current medical needs [.] [transported, and the method, timing and distance of the transportation were reasonably related to the [patient's] [] then current medical needs.] [¶] [A 'primary caregiver' is an individual designated by [the person exempted] [(name)] who has consistently assumed responsibility for the housing, health, or safety of that person.] [¶] ['Recommendation' and 'approval' have different meanings. To 'recommend' something is to present it as worthy of acceptance or trial. To 'approve' something is to express a favorable opinion of it. The word 'recommendation,' as used in this instruction, suggests the physician has raised the issue of marijuana use and presented it to the patient as a treatment that would benefit the patient's health

by providing relief from an illness. The word 'approval,' on the other, suggests the patient has raised the issue of marijuana use, and the physician has expressed a favorable opinion of marijuana use as a treatment for the patient.] [¶] To establish the defense of compassionate use, the burden is upon the defendant to raise a reasonable doubt as to guilt of the unlawful [possession] [or] [cultivation] [or] [transportation] of marijuana." (*CALJIC No. 12.24.1* (2004 rev.) (7th ed. 2003), italics added.) The italicized portions, governing the primary caregiver defense, were in dispute, and the trial court omitted them from its instructions.

[*282]

The Jury's Verdict and Subsequent Proceedings

So instructed, the jury convicted Mentch of both cultivation and possession for sale. (§§ 11358, 11359.) The trial court suspended imposition of sentence and imposed three years' probation.

The Court of Appeal reversed Mentch's convictions. It concluded: "Where, as here, [Mentch] presented evidence that he not only grew medical marijuana for several qualified patients, but also counseled them on the best varieties to grow and use for their ailments and accompanied them to medical appointments, albeit on a sporadic basis, there was enough evidence to present to the jury." Because there was sufficient evidence to support an instruction on the primary caregiver defense, the trial court erred by redacting all references to it in *CALJIC No. 12.24.1*. (See [***487] *People v. Michaels* (2002) 28 Cal.4th 486, 529 [122 Cal. Rptr. 2d 285, 49 P.3d 1032] [defendant has a right to have the trial court give a jury instruction on any affirmative defense for which the record contains substantial evidence].)

We granted review to address the meaning of "primary caregiver" under the Act.

DISCUSSION

I. The Primary Caregiver Defense

A. The Meaning of "Primary Caregiver"

(1) We interpret voter initiatives using the same principles that govern construction of legislative enactments. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037 [56 Cal. Rptr. 3d 814, 155 P.3d 226].) Thus, we begin with the text as the first and best indicator of intent. (*Ibid.*; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 927 [22 Cal. Rptr. 3d 530, 102 P.3d 915].) If the text is ambiguous and supports multiple interpretations, we may then turn to

45 Cal. 4th 274, *, 195 P.3d 1061, **;
85 Cal. Rptr. 3d 480, ***; 2008 Cal. LEXIS 13630

[**1067] extrinsic sources such as ballot summaries and arguments for insight into the voters' intent. (*Professional Engineers*, at [*283] p. 1037; *Legislature v. Eu* (1991) 54 Cal.3d 492, 504 [286 Cal. Rptr. 283, 816 P.2d 1309]; *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 673, fn. 14 [194 Cal. Rptr. 781, 669 P.2d 17].)

Section 11362.5, subdivision (d) provides: "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." In turn, section 11362.5, subdivision (e) defines "primary caregiver" as "the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person."

(2) This statutory definition has two parts: (1) a primary caregiver must have been designated as such by the medicinal marijuana patient; and (2) he or she must be a person "who has consistently assumed responsibility for the housing, health, or safety of" the patient. It is clear from the structure of subdivision (e) of section 11362.5 that this latter part of the definition has additional restrictive power, or else the subdivision would have ended with the phrase "by the person exempted under this section," thereby allowing every patient to designate one person without limitation. Thus, to qualify for exemption under this subdivision, a person must satisfy both halves--the "designee" clause and the "responsibility" clause. (See *People v. Mower* (2002) 28 Cal.4th 457, 475 [122 Cal. Rptr. 2d 326, 49 P.3d 1067] ["For a person to be a qualified primary caregiver, he or she must be 'designated' as such by a qualified patient, and must have 'consistently assumed responsibility' for the qualified patient's 'housing, health, or safety.'" (Italics added.)] Designation is necessary, but not sufficient. (*People v. Urziceanu* (2005) 132 Cal.App.4th 747, 773 [33 Cal. Rptr. 3d 859]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1397 [70 Cal. Rptr. 2d 20].)

(3) Three aspects of the structure of the responsibility clause are noteworthy. From these aspects, as we shall explain, we conclude a defendant asserting primary caregiver status must prove at a minimum that he or she (1) consistently provided caregiving, (2) independent of any assistance in taking medical marijuana, (3) at or before the time he or she assumed responsibility for assisting with medical marijuana.

[***488] First, the text requires that the primary caregiver have "consistently" assumed responsibility for the patient's care. "Consistently" suggests an ongoing relationship marked by regular and repeated actions over

time. In *People ex rel. Lungren v. Peron*, *supra*, 59 Cal.App.4th 1383, for example, the many customers of a marijuana club, the Cannabis Buyers' Club, [*284] executed pro forma designations of the club as their primary caregiver. The Court of Appeal correctly rejected the assertion that the buyers' club could qualify as a primary caregiver in these circumstances: "A person purchasing marijuana for medicinal purposes cannot simply designate seriatim, and on an ad hoc basis, drug dealers on street corners and sales centers such as the Cannabis Buyers' Club as the patient's 'primary caregiver.' The primary caregiver the patient designates must be one 'who has consistently assumed responsibility for the housing, health, or safety of [the patient].'" (*Id.* at p. 1396.) One must consistently--"with persistent uniformity" (3 Oxford English Dict. (2d ed. 1989) p. 773) or "in a persistent or even manner" (Webster's 3d New Internat. Dict. (2002) p. 484)--have assumed responsibility for a patient's housing, health, or safety, or some combination of the three.

Second, the definition of a primary caregiver is written using a past participle--"has consistently assumed." (§ 11362.5, *subd.* (e).) This reinforces the inference arising from the use of the word "consistently" that primary caregiver status requires an existing, established relationship. In some situations, the formation of a bona fide caregiving relationship and the onset of assistance in taking medical marijuana may be contemporaneous, as with a cancer patient entering chemotherapy who has a recommendation for [**1068] medical marijuana use and has a live-in or home-visit nurse to assist with all aspects of his or her health care, including marijuana consumption. (See § 11362.7, *subd.* (d)(1) [primary caregiver may include employees of hospice or home health agency].) Even in this scenario, however, the caregiving relationship will arise at or before the onset of assistance in the administration of marijuana. What is not permitted is for an individual to establish an after-the-fact caregiving relationship in an effort to thereby immunize from prosecution previous cultivation or possession for sale. (Cf. *People v. Rigo* (1999) 69 Cal.App.4th 409, 412-415 [81 Cal. Rptr. 2d 624] [doctor may not give postarrest recommendation to bless prior use].)⁵

5 In holding that the assumption of primary caregiver responsibilities cannot apply retroactively to immunize prior cultivation or possession of marijuana, we do not suggest it would not apply prospectively. Defendants who show they satisfied all other prerequisites for primary caregiver status for a given patient at some point after the onset of providing marijuana may avail themselves of the defense going forward, even if they remain subject to prosecution for actions taken prior to assumption of a primary caregiver role.

45 Cal. 4th 274, *, 195 P.3d 1061, **;
85 Cal. Rptr. 3d 480, ***; 2008 Cal. LEXIS 13630

Third, from these two aspects of the text, as well as logic, we draw a further inference: a primary caregiver must establish he or she satisfies the responsibility clause based on evidence independent of the administration of medical marijuana. Under the Act, a primary caregiver relationship is a necessary antecedent, a predicate for being permitted under state law to possess or cultivate medical marijuana. The possession or cultivation of marijuana for medical purposes cannot serve as the basis for making lawful [*285] the possession or cultivation of marijuana for medical purposes; to conclude otherwise would rest the primary caregiver defense on an entirely circular footing.

We thus agree with the Court of Appeal in *People v. Frazier* (2005) 128 Cal.App.4th 807, 823 [27 Cal. Rptr. 3d 336], which rejected the argument that "a 'primary caregiver' is a person who 'consistently grows and supplies physician approved marijuana for a medical marijuana patient to serve the health needs of that patient'" The *Frazier* court concluded that, while if one were already qualified as a primary caregiver one could consistently grow and supply medical marijuana to a patient, the consistent [***489] growth and supply of medical marijuana would not by itself place one in the class of primary caregivers. (*Ibid.*; see also *People v. Windus* (2008) 165 Cal.App.4th 634, 644 [81 Cal. Rptr. 3d 227] ["Case law is clear that one who merely supplies a patient with marijuana has no defense under the [Act]."].)⁶

⁶ Mentch directs us to the Attorney General's Act guidelines concerning medical marijuana (see § 11362.81, *subd. (d)*) as supporting a contrary definition of "primary caregiver," but in fact the guidelines are wholly consistent with case law and the statutory text and afford Mentch no support. The guidelines note: "Although a 'primary caregiver who consistently grows and supplies ... medicinal marijuana for a section 11362.5 patient is serving a health need of the patient,' someone who merely maintains a source of marijuana does not automatically become the party 'who has consistently assumed responsibility for the housing, health, or safety' of that purchaser." (Cal. Atty. Gen., Guidelines for the Security and Non-division of Marijuana Grown for Medical Use (Aug. 2008) pt. II.B., p. 4.) They do not suggest provision of medical marijuana is alone sufficient to qualify one as a primary caregiver, but recognize instead that the provision of marijuana may be one part of caregiving for an ailing patient.

The trial court accurately assessed the law when, in denying Mentch's request for a primary caregiver instruction, it explained: "I'm satisfied that simply providing marijuana, in and of itself to these folks does not--you

don't bootstrap yourself to becoming the primary caregiver because you're providing [marijuana]" and "you have to be a caregiver *before* you can provide the marijuana." (Italics added.) Later, in denying Mentch's motion for a judgment of acquittal (*Pen. Code, § 1118.1*), the trial court reiterated the point: "There has to be something more to be a caregiver than simply providing marijuana. Otherwise, there would be no reason to have the definition of a caregiver, because anybody who would be providing marijuana and related services would qualify as a caregiver[,] therefore giving them a defense to the very activity that's otherwise illegal, and I don't think that makes any sense in terms of statutory construction, nor do I think it was intended by the people or the Legislature."

Mentch himself highlights the dog-chasing-its-tail absurdity of allowing the administration of medical marijuana to patients to form the basis for authorizing the administration of medical marijuana to patients in his attempts to [*286] distinguish this case from *People ex rel. Lungren v. Peron*, *supra*, 59 Cal.App.4th 1383, and *People v. Urziceanu*, *supra*, 132 Cal.App.4th 747. *Peron* and *Urziceanu*, he argues, involved only casual or occasional [**1069] provision of medical marijuana; here, in contrast, he "consistently" provided medical marijuana, "consistently" allowed his patients to cultivate medical marijuana at his house, and was his five patients' "exclusive source" for medical marijuana. The essence of this argument is that the occasional provision of marijuana to someone is illegal, but the frequent provision of marijuana to that same person may be lawful. The vice in the approach of the cooperatives at issue in *Peron* and *Urziceanu* therefore evidently was not that they provided marijuana to their customers; it was that they did not do it enough.

Nothing in the text or in the supporting ballot arguments suggests this is what the voters intended. The words the statute uses--housing, health, safety--imply a caretaking relationship directed at the core survival needs of a seriously ill patient, not just one single pharmaceutical need. The ballot arguments in support suggest a patient is generally personally responsible for noncommercially supplying his or her own marijuana: "Proposition [***490] 215 allows patients to cultivate their own marijuana simply because federal laws prevent the sale of marijuana, and a state initiative cannot overrule those laws." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) argument in favor of Prop. 215, p. 60.) But as the focus is on the "seriously and terminally ill" (*ibid.*), logically the Act must offer some alternative for those unable to act in their own behalf; accordingly, the Act allows "primary caregiver[s]" the same authority to act on behalf of those too ill or bedridden to do so" (*People ex rel. Lungren v. Peron*, *supra*, 59 Cal.App.4th at p. 1394). To exercise

that authority, however, one must be a "primary"--principal, lead, central--"caregiver"--one responsible for rendering assistance in the provision of daily life necessities--for a qualifying seriously or terminally ill patient.⁷

7 The Act is a narrow measure with narrow ends. As we acknowledged only months ago, "the proponents' ballot arguments reveal a delicate tightrope walk designed to induce voter approval, which we would upset were we to stretch the proposition's limited immunity to cover that which its language does not." (*Ross v. Raging-Wire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 930 [70 Cal. Rptr. 3d 382, 174 P.3d 200], quoting *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1152 [128 Cal. Rptr. 2d 844].) The Act's drafters took pains to note that "neither relaxation much less evisceration of the state's marijuana laws was envisioned." (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1546 [66 Cal. Rptr. 2d 559]; see also *People v. Urziceanu, supra*, 132 Cal.App.4th at pp. 772-773 [the Act "is a narrowly drafted statute," not an attempt to "decriminalize marijuana on a wholesale basis"].) We must interpret the text with those constraints in mind.

We note in passing that some other states in adopting their own medical marijuana compassionate use acts have adopted substantially different and manifestly broader language in defining their primary caregiver exceptions. In New Mexico, for example, a primary caregiver is "a resident of New Mexico [*287] who is at least eighteen years of age and who has been designated by the patient's practitioner as being necessary to take responsibility for managing the well-being of a qualified patient with respect to the medical use of cannabis." (*N.M. Stat. § 26-2B-3, par. F*; see also *Vt. Stat. Ann. tit. 18, § 4472, subd. (6)* [registered caregiver must be 21 years old, must have no drug convictions, and must have "agreed to undertake responsibility for managing the well-being of a registered patient with respect to the use of marijuana for symptom relief"].) Had the drafters of the Act intended the broad understanding of "primary caregiver" that Mentch urges, they might well have been expected to select similar language. They did not.⁸

8 More generally, we note that in the 12 states to have adopted compassionate use acts, all such states' acts include a primary caregiver exception or its equivalent, and virtually all include some mechanism for limiting primary caregiver status so the exception does not swallow the rule. Most rely on either mandatory state registries (*Alaska Stat. § 17.37.010, subds. (a), (g)* [Alaska]; *Mont. Code Ann. § 50-46-201* [Montana]; *N.M. Stat. §*

26-2B-4, par. D [New Mexico]) or confine each caregiver to a set number of patients (*Wn. Rev. Code § 69.51A.010 (1)(d)* [Washington]) or both (*Haw. Rev. Stat. § 329-123, subd. (c)* [Hawaii]; *R.I. Gen. Laws §§ 21-28.6-3, subd. (6), 21-28.6-4, subd. (c)* [Rhode Island]; *Vt. Stat. Ann. tit. 18, § 4474, subds. (a), (c)* [Vermont]).

A minority (Colorado, Nevada, and Oregon) have instead adopted California's approach of limiting the caregiver exception by using a higher standard for the nature of the relationship and responsibility assumed. (See *Colo. Const., art. XVIII, § 14, subd. (1)(f)* [must have "significant responsibility for managing the well-being of a patient who has a debilitating medical condition"]; *Nev. Rev. Stat. § 453A.080, subsec. 1(b)* [must have "significant responsibility for managing the well-being of a person diagnosed with a chronic or debilitating medical condition"]; *Or. Rev. Stat. § 475.302, subsec. (5)* [must have "significant responsibility for managing the well-being of a person who has been diagnosed with a debilitating medical condition"].)

[**1070] [***491] We have no doubt our interpretation of the statute will pose no obstacle for those bona fide primary caregivers whose ministrations to their patients the Act was actually intended to shield from prosecution. The spouse or domestic partner caring for his or her ailing companion, the child caring for his or her ailing parent, the hospice nurse caring for his or her ailing patient--each can point to the many ways in which they, medical marijuana aside, attend to and assume responsibility for the core survival needs of their dependents. The Act allows them, insofar as state criminal law is concerned, to add the provision of marijuana, where medically recommended or approved, as one more arrow in their caregiving quiver. It simply does not provide similar protection where the provision of marijuana is itself the substance of the relationship.

B. Sufficiency of the Evidence to Support an Instruction on the Primary Caregiver Affirmative Defense

We turn to the merits of Mentch's request for a primary caregiver instruction in light of the evidence he adduced and the evidence he sought to adduce. [*288]

(4) "It is well settled that a defendant has a right to have the trial court ... give a jury instruction on any affirmative defense for which the record contains substantial evidence [citation]--evidence sufficient for a reasonable jury to find in favor of the defendant [citation]--unless the defense is inconsistent with the defendant's theory of the case [citation]. In determining whether the evidence is sufficient to warrant a jury instruction, the

45 Cal. 4th 274, *, 195 P.3d 1061, **;
85 Cal. Rptr. 3d 480, ***; 2008 Cal. LEXIS 13630

trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt' [Citations.]" (*People v. Salas* (2006) 37 Cal.4th 967, 982-983 [38 Cal. Rptr. 3d 624, 127 P.3d 40]; see also *People v. Michaels*, *supra*, 28 Cal.4th at p. 529.) On appeal, we likewise ask only whether the requested instruction was supported by substantial evidence--evidence that, if believed by a rational jury, would have raised a reasonable doubt as to whether Mentch was a primary caregiver and thus innocent of unlawful possession or cultivation.

Mentch relies on three strands of evidence: his alleged provision of shelter to one patient, his taking of other patients to medical appointments, and his ongoing provision of both marijuana and marijuana advice and counseling to all his patients. Even crediting this evidence, as we must for purposes of deciding whether he was entitled to an instruction, we discern a series of interrelated shortcomings. Some of Mentch's caregiving was independent of providing marijuana, but was not provided at or before the time he began providing marijuana. Some of it may have been at or before the time he began providing marijuana, but was not consistent. And some of it was consistent, but was not independent of providing marijuana. But none of the evidence demonstrated satisfaction of *each* of the three aspects of the responsibility clause we have identified; none of it was sufficient to raise a reasonable doubt as to whether Mentch had provided his patients consistent caregiving, independent of providing them marijuana, at or before the time he began providing them marijuana.

[**492] First, Mentch argues Eldridge moved in shortly before the June 6, 2003, search. Unfortunately for Mentch's argument, the record directly contradicts this assertion. Eldridge testified she lived elsewhere at the time, and Mentch did not testify to the contrary. Even if the record supported it, however, the argument would not address the lack of any evidence of a primary caregiving relationship during the preceding year and a half during which Mentch was, by his own admission, selling Eldridge marijuana; it would not retroactively bless Mentch's prior cultivation of marijuana and sale of marijuana to her.

[**1071] Second, Mentch testified he took "a couple" patients to medical appointments "sporadically." A sporadic assumption of responsibility is the antithesis of a consistent assumption of responsibility; it cannot satisfy the responsibility clause. [*289]

(5) Third, Mentch otherwise relied almost exclusively on the provision of medical marijuana to establish a primary caregiving relationship. But the evidence must establish an assumption of responsibility independent of

the provision of medical marijuana. This shortcoming is also intertwined with Mentch's problems showing a consistent assumption of responsibility: what "caregiving" was consistent consisted only of providing marijuana, while what caregiving was independent of providing marijuana was not consistent.

There is a final overarching problem with the evidence. Mentch testified to providing marijuana to five patients and also to occasionally growing too much and providing the excess to marijuana clubs. But where, as here, Mentch was charged with single counts of possession and cultivation, primary caregiver status would provide Mentch a defense only if it extended to all the marijuana he possessed or cultivated. Consider, for example, a defendant who testified that he (1) grew marijuana, (2) gave half to his critically ill daughter, a qualified patient for whom he was the designated primary caregiver and by whom he was reimbursed for growing expenses, and (3) sold the other half on the street. However much the primary caregiver defense might protect his actions toward his daughter, it would have no bearing on his case because a portion of his distribution of marijuana for money would be unprotected from state prosecution. Similarly, Mentch's testimony that he "sporadically" took "a couple" of the five patients to medical appointments, and his assertion (unsupported by the record) that he provided Eldridge shelter, would, even if believed, do nothing to insulate from prosecution his cultivation of and sale of marijuana to those for whom he did not provide shelter or nonmarijuana-based health care. (See *People v. Urziceanu*, *supra*, 132 Cal.App.4th at p. 773 [rejecting primary caregiver defense because the defendant failed to adduce evidence he was "the primary caregiver for *all* of the patients who patronized his cooperative" (italics added)].) Nor would it protect him from prosecution for cultivating marijuana and providing it to cannabis clubs. (See *People v. Galambos*, *supra*, 104 Cal.App.4th at pp. 1165-1167 [the primary caregiver defense does not extend to supplying marijuana to a cooperative]; *People v. Trippet*, *supra*, 56 Cal.App.4th at p. 1546 [noting with approval a ballot pamphlet argument that the Act was not intended to protect "anyone who grows too much, or tries to sell it"]; Ballot Pamp., Gen. Elec. (Nov. 5, 1996) rebuttal to argument against Prop. 215, p. 61.)⁹

9 Mentch's primary caregiver defense depended on the jury crediting his own testimony on the scope of his cultivation and distribution of marijuana. This is not a case where, on the record presented, a rational jury could credit some evidence that supported a primary caregiver defense and disbelieve other evidence that suggested marijuana cultivation or possession above and beyond that immunized from state prosecution by the

45 Cal. 4th 274, *, 195 P.3d 1061, **;
85 Cal. Rptr. 3d 480, ***; 2008 Cal. LEXIS 13630

Act. Nor is it a case where a defendant was charged with multiple counts and a rational jury could conclude the Act provided a complete defense to some counts but not others.

[*290]

[***493] (6) The Court of Appeal appropriately recognized that the right to a jury resolution of all disputed factual issues is to be jealously protected. However, trial courts are still responsible for acting as gatekeepers and determining whether the evidence presented, considered in the light most favorable to the defendant, could establish an affirmative defense--here, whether it could give rise to a reasonable doubt as to the existence of an established, legally cognizable primary caregiving relationship. The trial court properly fulfilled its role here in declining to give a primary caregiver instruction on this record.

II. Defenses Under the Medical Marijuana Program

Before us, Mentch contends in the alternative that the 2003 enactment of the Medical Marijuana Program (Program; § 11362.7 *et seq.*) provides a defense to cultivation and [*1072] possession for sale charges for those who give assistance to patients and primary caregivers in (1) administering medical marijuana, and (2) acquiring the skills necessary to cultivate or administer medical marijuana (§ 11362.765, *subs. (a), (b)(3)*). Accordingly, he argues the trial court breached its duty to give sua sponte instructions on any affirmative defense supported by the evidence. (See *People v. Salas, supra*, 37 Cal.4th at p. 982.) As Mentch misinterprets the scope and effect of the Program, we conclude the trial court committed no error in failing to instruct on any defense arising from it.

(7) The Program was passed in part to address issues not included in the Act, so as to promote the fair and orderly implementation of the Act and to "[c]larify the scope of the application of the [A]ct." (Stats. 2003, ch. 875, § 1; see *People v. Wright (2006)* 40 Cal.4th 81, 93 [51 Cal. Rptr. 3d 80, 146 P.3d 531].) As part of its effort to clarify and smooth implementation of the Act, the Program immunizes from prosecution a range of conduct ancillary to the provision of medical marijuana to qualified patients. (§ 11362.765.)

(8) Having closely analyzed the text of section 11362.765, however, we conclude it does not do what Mentch says it does. While the Program does convey additional immunities against cultivation and possession for sale charges to specific groups of people, it does so only for specific actions; it does not provide globally that the specified groups of people may never be charged with cultivation or possession for sale. That is, the immunities conveyed by section 11362.765 have three de-

fining characteristics: (1) they each apply only to a specific group of people; (2) they each apply only to a specific range of conduct; and (3) they each apply only against a specific set of laws. Subdivision (a) provides in relevant part: "Subject to the requirements of this article, the individuals specified in subdivision (b) shall not be [*291] subject, *on that sole basis*, to criminal liability under [enumerated sections of the Health and Safety Code]." (§ 11362.765, *subd. (a)*, italics added.) Thus, *subdivision (b)* identifies both the groups of people who are to receive immunity and the "sole basis," the range of their conduct, to which the immunity applies, while *subdivision (a)* identifies the statutory provisions against which the specified people and conduct are granted immunity.

[***494] For example, *subdivision (b)(1)* grants immunity to a "qualified patient or a person with [a Program] identification card" who "transports or processes marijuana for his or her own personal medical use." (§ 11362.765, *subd. (b)(1)*.) As we explained in *People v. Wright, supra*, 40 Cal.4th 81, this means a specified group--qualified patients and Program identification card holders--may not be prosecuted under particular state laws for specific conduct--transportation or processing for personal use--that otherwise might have been criminal. (*Id.* at p. 94; see *id.* at p. 92 [recognizing that the Program supersedes statement in *People v. Young (2001)* 92 Cal.App.4th 229, 237 [111 Cal. Rptr. 2d 726], that the Act does not immunize marijuana transportation].)

The same is true of *subdivision (b)(2)* of section 11362.765, which likewise extends to a specific group--primary caregivers--state immunity for particular conduct--transportation, processing, administration, delivery, or donation--that might otherwise fall afoul of state law. (See *People v. Trippet, supra*, 56 Cal.App.4th at p. 1550 [acknowledging that the plain language of the Act, if literally applied, might fail to protect primary caregivers transporting marijuana down a hallway to their patients].)¹⁰

¹⁰ Section 11362.765, *subdivision (b)(2)* incorporates the quantitative limits of section 11362.77 in defining the scope of the immunity it provides. The constitutionality of those limits is not before us here, and we express no opinion on them. (See *People v. Kelly, review granted Aug. 13, 2008*, S164830.)

Finally, as relevant here, *subdivision (b)(3)* of section 11362.765 grants immunity to a specific group of individuals--those who assist in administering medical marijuana or acquiring the skills necessary to cultivate it--for specific conduct, namely, assistance in the administration of, or teaching how to cultivate, [*1073] medical marijuana. ¹¹ This immunity is significant; in its

absence, those who assist patients or primary caregivers in learning how to cultivate marijuana might themselves be open to prosecution for cultivation. (§ 11358.)

11 Section 11362.765, subdivision (b)(3) extends the statutory immunities of subdivision (a) of that section to "[a]ny individual who provides assistance to a qualified patient or a person with [a Program] identification card, or his or her designated primary caregiver, in administering medical marijuana to the qualified patient or person or acquiring the skills necessary to cultivate or administer marijuana for medical purposes to the qualified patient or person."

[*292]

Here, this means Mentch, to the extent he assisted in administering, or advised or counseled in the administration or cultivation of, medical marijuana, could not be charged with cultivation or possession for sale "on that sole basis." (§ 11362.765, *subd. (a)*.) It does not mean Mentch could not be charged with cultivation or possession for sale on *any* basis; to the extent he went beyond the immunized range of conduct, i.e., administration, advice, and counseling, he would, once again, subject himself to the full force of the criminal law. As it is undisputed Mentch did much more than administer, advise, and counsel, the Program provides him no defense, and the trial court did not err in failing to instruct on it.¹²

12 In our grant of review, we asked the parties to brief whether a defendant's burden to raise a reasonable doubt regarding the compassionate use defense (see *People v. Mower, supra*, 28 Cal.4th at p. 477) is a burden of production under *Evidence Code* section 110 or a burden of persuasion under *Evidence Code* section 115. We also asked the parties to address whether the trial court should instruct the jury on a defendant's burden and, if so, how. (Compare CALJIC No. 12.24.1 (2004 rev.) (7th ed. 2003) with CALCRIM No. 2370 (2008).) Because Mentch has failed to show he was entitled to a primary caregiver instruction, error--if any--in describing Mentch's burden in this case would have been harmless, so we need not and do not resolve these issues.

[***495] **DISPOSITION**

For the foregoing reasons, we reverse the Court of Appeal's judgment.

George, C. J., Kennard, J., Baxter, J., Chin, J., Moreno, J., and Corrigan, J., concurred.

CONCUR BY: CHIN

CONCUR

CHIN, J., Concurring.--I entirely agree with, and have signed, the majority opinion. I write separately to underscore the importance of an issue that we asked the parties to brief but that, due to our holding on the merits of the compassionate use defense, we do not have to decide in this case.

In *People v. Mower* (2002) 28 Cal.4th 457 [122 Cal. Rptr. 2d 326, 49 P.3d 1067], we held that the defendant has the burden to raise a reasonable doubt regarding the compassionate use defense. As the majority opinion notes, the trial court instructed the jury on the compassionate use defense by modifying the standard CALJIC instruction. The instruction included this statement: "To establish the defense of compassionate use, the burden is upon the defendant to raise a reasonable doubt as to guilt" (CALJIC No. 12.24.1 (2004 rev.) (7th ed. 2003), quoted in maj. opn., *ante*, at pp. 281-282, fn. 4.) The standard CALCRIM instruction, by contrast, does not place any burden whatever on the defendant. Instead, it states, "The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or transport marijuana for medical purposes. If the People have not [*293] met this burden, you must find the defendant not guilty of this crime." (Judicial Council of Cal., *Crim. Jury Instns.* (2008) CALCRIM No. 2363.)

Aware of the difference between the two standard instructions, and concerned about whether the trial court properly instructed the jury in this case, we directed the parties "to brief the additional question whether the defendant's burden to raise a reasonable doubt regarding the compassionate use defense (see *People v. Mower*, *supra*,] 28 Cal.4th 457) is a burden of producing evidence under *Evidence Code* section 110 or a burden of proof under *Evidence Code* section 115. (See, e.g., *Evid. Code*, §§ 500, 501, 502, 550, and the [**1074] Law Revision Commission Comments thereto; see also *Pen. Code*, § 189.5 and cases interpreting it, including *People v. Deloney* (1953) 41 Cal.2d 832, 841-842 [264 P.2d 532], *People v. Cornett* (1948) 33 Cal.2d 33, 42 [198 P.2d 877], and *People v. Loggins* (1972) 23 Cal.App.3d 597 [100 Cal. Rptr. 528]; and *People v. Frazier* (2005) 128 Cal.App.4th 807, 816-822 [27 Cal. Rptr. 3d 336].) In this regard, the parties should also discuss whether the trial court should instruct the jury on the defendant's burden to raise a reasonable doubt and, if so, how. (Compare CALJIC No. 12.24.1 (2005 Revision) with ... CALCRIM No. 2363.)"

The parties have briefed the question and agree on the answer. They agree that the defendant's burden is only to produce evidence under *Evidence Code* section

45 Cal. 4th 274, *, 195 P.3d 1061, **;
85 Cal. Rptr. 3d 480, ***; 2008 Cal. LEXIS 13630

110, and that once the trial court finds the defendant has presented sufficient evidence to warrant an instruction on the defense, the defendant has fully satisfied this burden; accordingly, the court should not instruct the jury on any defense burden. (While generally agreeing that the [***496] standard CALCRIM instruction is correct in this regard, the Attorney General does suggest one modification of that instruction.)

If the parties' answer to our question is correct, *CALJIC No. 12.24.1* misinstructs the jury. The Attorney General argues that any error in this case was harmless beyond a reasonable doubt for two reasons: (1) error in requiring defendant to raise a reasonable doubt as to a defense is inherently harmless in light of the instructions as a whole, which make clear to the jury that the prosecution has the overall burden of proof beyond a reasonable doubt; and (2) defendant simply did not establish the compassionate use defense. The majority concludes that

any error in this regard was harmless because defendant "has failed to show he was entitled to a primary caregiver instruction" (Maj. opn., *ante*, at p. 292, fn. 11.) I agree and thus further agree that we need not now decide the question regarding the nature of defendant's burden to raise a reasonable doubt. (*Ibid.*) [*294]

Nevertheless, the question remains important. As the Attorney General notes in arguing that a defendant's burden is only to produce evidence under *Evidence Code section 110*, and that the court should not instruct the jury on this burden, "An instruction on the defendant's burden of production may run risks that are best avoided." Accordingly, the question needs to be resolved, preferably sooner rather than later. In the meantime, trial courts might well be advised to be cautious before instructing on any defense burden.

Corrigan, J., concurred.