In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

GOLDY RAYBON,

Defendant and Appellant.

[And four other cases.]

Case No. S256978

Court of Appeal, Third Appellate District,
Case Nos. C084853, C084911, C084960, C084964, and C085101

Sacramento County Superior Court,
Case Nos. 09F08248, 13F03230, 08F07402, 12F00411, and 06F11185
The Honorable Curtis M. Fiorini, Judge

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

Did Proposition 64, which generally legalized the simple possession of less than an ounce of cannabis, also legalize such possession in state prisons and other custodial institutions?

INTRODUCTION

Prison inmates are subject to "'the necessary withdrawal or limitation of many privileges and rights ....'" (*Pell v. Procunier* (1974) 417 U.S. 817, 822, citation omitted.) These limitations further multiple goals, the "central" of which is "the institutional consideration of internal security within the corrections facilities themselves." (*Id.* at p. 823.) At issue here is the longstanding, comprehensive statutory scheme preventing access to contraband items—including cannabis—in custodial institutions. That scheme "flow[s] from the assumption that drugs, weapons, and other contraband promote disruptive and violent acts in custody, including gang involvement in the drug trade." (*People v. Low* (2010) 49 Cal.4th 372, 387-388.) The ban on contraband is "prophylactic"; it "attack[s] the '"very presence"' of such items in the penal system." (*Id.* at p. 388.)

The voters of course have the power to alter this statutory scheme. (See *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 930 [construing effect of Compassionate Use Act of 1996 on employment law].) They could, for example, decide to legalize the possession of cannabis in custodial institutions, overriding the Legislature's policy choices and the existing prerogative of custodial officials to authorize—or not—individual inmates' access to prescription and over-the-counter drugs. The question here is whether the voters intended to do so when they passed Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act, at the general election in 2016. The answer to this question must focus on the intent of the voters. (*Ross*, *supra*, 42 Cal.4th at

p. 930; *People v. Valencia* (2017) 3 Cal.5th 347, 357.) When the question is whether the voters intended to alter a statutory scheme as comprehensive and longstanding as the one at issue here, there must be a "formally expressed intent" to change the established status quo. (*Ross, supra*, 42 Cal.4th at p. 930; *Valencia, supra*, 3 Cal.5th at p. 390.) Failing to hew closely to the voters' intent would result in "'unintended consequences,'" which would "'strengthen[ ] neither the initiative power nor the democratic process.'" (*Valencia, supra*, 3 Cal.5th at p. 386, quoting *Ross, supra*, 42 Cal.4th at p. 930.)

There is no suggestion that the voters intended to legalize the possession of cannabis in custodial institutions when they passed Proposition 64. The Official Voter Information Guide presented the voters with ten pages of summaries, analyses, and arguments about the regulated legalization of cannabis use by members of the general public. (Official Voter Information Guide, Gen. Elec. (Nov. 8, 2016) pp. 90-99 ("Voter Guide").)[1] But that part of the Guide contained not one word about the separate, comprehensive, and longstanding prohibitions on cannabis in custodial institutions, much less analysis or argument putting voters on notice that Proposition 64 would profoundly affect those prohibitions. And, in the 30-plus pages of the initiative's text, there was only a single mention of cannabis in prisons—in a saving clause specifying that Proposition 64 would *not* amend or repeal laws "pertaining to smoking or ingesting cannabis" in custodial institutions. (Health & Saf. Code, § 11362.45, subd. (d); Voter Guide, *supra*, at pp. 178-210.)

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[1] A complete copy of the Voter Guide is available at <https://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf> [as of Dec. 3, 2019].

Appellants are present or former inmates seeking relief from contraband convictions that were final prior to the passage of Proposition 64. They rely on a negative implication—that Proposition 64 *would* repeal all other laws applying to state prisons and custodial institutions that are not framed precisely in terms of "smoking" or "ingesting" cannabis. But that crabbed reading does not reasonably flow from the broad "pertaining to" terminology. And appellants' reading would undermine the purposes of Proposition 64 and cause serious unintended consequences. Proposition 64 was intended to create a legal, regulated market for the general public's recreational use of cannabis—not to undermine laws that ensure order and safety, and prevent underground markets and gang activity, inside prison walls.

Proposition 64 did not contain the formally expressed intent necessary to legalize the possession of cannabis in custodial institutions. The judgment of the Court of Appeal should be reversed.

STATEMENT OF THE CASE

A. Decision of the Superior Court: Proposition 64 Did Not Repeal Laws Banning Cannabis in Custodial Institutions

This case involves a consolidated appeal by five appellants: Anthony Cooper, Dwain Davis, Scott Haynes, James Potter, and Goldy Raybon. (Cooper CT 41 [notice of appeal]; Davis CT 18 [same]; Haynes CT 49 [same]; Potter CT 36 [same]; Raybon CT 64 [same]; see *People v. Raybon* (2019) 36 Cal.App.5th 111, 113.) The proceedings involving Raybon are representative.

In 2009, the Sacramento County District Attorney filed a complaint charging Raybon with violating Penal Code section 4573.6. (Raybon CT 10.) That statute makes it a felony to knowingly possess certain items—including "any controlled substances, the possession of which is prohibited

by Division 10 (commencing with Section 11000) of the Health and Safety Code"—in a state prison or other custodial institution without administrative authorization. (Pen. Code, § 4573.6, subd. (a).)[2] The complaint alleged in particular that Raybon had possessed marijuana in Folsom State Prison without being authorized to do so by the rules or by prison officials. (Raybon CT 10.) In 2011, Raybon pleaded nolo contendere and the court sentenced him to a consecutive term of four years in prison, an enhanced sentence based on a prior felony. (*Id.* at pp. 5-6.)

In 2016, the voters approved Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act. (Prop. 64, § 1, approved by voters, Gen. Elec. (Nov. 8, 2016).)[3] The Act included, among other things, a provision legalizing certain acts involving 28.5 grams or less of cannabis by persons 21 years of age or older. (Health & Saf. Code, § 11362.1, added by Prop. 64, § 4.4.) In particular, the legalization provision states that it "shall be lawful under state and local law, and shall not be a violation of state or local law" for a person 21 years of age or older to possess, transport, or give away not more than 28.5 grams of cannabis, "[s]ubject to" other enumerated provisions. (*Id.* at subd. (a).) The listed provisions include a savings provision that lists various laws that are not affected by the legalization provision. (Health & Saf. Code, § 11362.45, added by Prop. 64,

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[2] See text of statute at pages 19-20, *post*.

[3] Proposition 64 used the term "marijuana" to refer to "all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin." (Former Health & Saf. Code, § 11018, as amended by Prop. 64, § 4.1.) The Legislature subsequently substituted the term "cannabis" for "marijuana" throughout the Health and Safety Code. (Stats. 2017, ch. 27, §§ 113-160.) Proposition 64 is described in additional detail at pages 23-28, *post*.

§ 4.8.) Expressly excepted from the legalization provision are "[l]aws pertaining to smoking or ingesting cannabis or cannabis products on the grounds of or within, any facility or institution under the jurisdiction of the Department of Corrections and Rehabilitation … ." (*Id.* at subd. (d).) The Act also included a provision allowing a person "currently serving a sentence" or who has "completed his or her sentence" to petition or apply for retroactive relief. (*Id.* at § 11361.8, subds. (a) & (e), added by Prop. 64, § 8.7.)

In 2017, Raybon filed a petition to have his contraband conviction dismissed pursuant to Proposition 64. (Raybon CT 31-36.1, 45-50.) The People opposed the petition, arguing that the Act did not change contraband law or entitle Raybon to retroactive relief. (Raybon CT 37-41.)

The superior court denied Raybon's petition. (Raybon CT 51-62.) The court observed that Proposition 64 did not change the classification of cannabis as a controlled substance. (*Id.* at pp. 55-56, citing Health & Saf. Code, § 11054.) And, although Proposition 64 permits the possession of cannabis by members of the general public under certain circumstances, "incarcerated inmates are routinely subject to different rules and freedoms than members of society." (*Id.* at pp. 56-57.) The court concluded that the wording of the retroactivity provision evinced the voters' intent that Proposition 64 would apply only to violations of the enumerated Health and Safety Code statutes, not the contraband provisions in the Penal Code. (Raybon CT 59-60.) The court also reasoned that it would have been irrational for the voters to allow prison inmates to possess cannabis while prohibiting them from actually using it. (*Id.* at p. 61.) Finally, the court observed that Proposition 64 did not expressly repeal or otherwise amend Penal Code section 4573.6, and that courts disfavor repeals by implication. (Raybon CT 62.)

B. Decision of the Appellate Court: Proposition 64 Legalized the Possession of Cannabis in Custodial Institutions

In 2019, the Court of Appeal, Third Appellate District, issued an opinion remanding the matter to the superior court with directions "to enter orders granting the petitions for relief pursuant to Health and Safety Code section 11361.8, subdivision (a)." (*Raybon*, *supra*, 36 Cal.App.5th at p. 126.) The court held that "under the plain language of Health and Safety Code section 11362.1, enacted as part of Proposition 64, possession of less than an ounce of cannabis in prison is no longer a felony." (*Raybon*, at p. 113.) The court began with the language of Penal Code section 4573.6, focusing on its cross-reference to the Health and Safety Code. It reasoned that under its prior decision in *People v. Fenton* (1993) 20 Cal.App.4th 965, involving a similar Penal Code provision prohibiting the smuggling of contraband, Penal Code section 4573.6 prohibits the possession of a controlled substance in a custodial institution only if division 10 of the Health and Safety Code would prohibit the same person from possessing the same amount of the same substance outside of prison. (*Raybon*, at pp. 116-117.)[4] The court also held that the savings clause's reference to laws "pertaining to smoking or ingesting cannabis" in custodial institutions did not except laws that prohibit the smuggling or possession of contraband. (*Raybon*, at pp. 121-122.) In the court's view, "it stretches the imagination" to believe that the voters had intended the reference to laws "pertaining to smoking or ingesting" cannabis in prison to include the prohibition on possessing cannabis in prison. (*Id.* at p. 121.) Instead, the

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[4] In *Fenton*, the Third Appellate District reversed an inmate's conviction under Penal Code section 4573 for smuggling an opioid into a custodial institution, because the inmate had received a prescription for the opioid from an outside practitioner. (20 Cal.App.4th at pp. 966-967.)

court posited that "[t]he purpose of the language is to describe the vast array of means of consumption," and that "consumption, not possession, is the act the voters determined should remain criminalized if the user is in prison." (*Id.* at p. 122.)

C. Petition for Review: The Division of Authority Between the Opinion Below and *People v. Perry*

The People petitioned for review, pointing to the division of authority between the opinion below and the earlier opinion of the First Appellate District, Division Two, in *People v. Perry* (2019) 32 Cal.App.5th 885. In that case, an inmate previously convicted of possessing cannabis in prison under Penal Code section 4573.6 petitioned for relief after enactment of Proposition 64. The *Perry* court affirmed the trial court's determination that the inmate petitioner was not entitled to resentencing under Proposition 64. (*Id.* at p. 897.)

The *Perry* court held that "Proposition 64 did not affect existing prohibitions against the possession of marijuana *in prison* or otherwise affect the operation of Penal Code section 4573.6." (*Perry*, *supra*, 32 Cal.App.5th at p. 890, original italics.) The court relied in large part on the savings clause in Proposition 64 referring to laws "pertaining to smoking or ingesting cannabis" in custodial institutions. (Health & Saf. Code, § 11362.45, subd. (d).) The court held that the "broad wording" of the savings clause implies "in the strongest of terms" that the legalization provision does not amend or repeal laws prohibiting possession of cannabis in prison. (*Perry, supra*, 32 Cal.App.5th at pp. 891, 895; see also *id.* at pp. 891-892 ["pertaining to" smoking or ingesting cannabis in prison includes any law "related to" such conduct].)

The court noted the reasonableness of this construction, observing that there was no apparent reason why the voters would have intended to legalize the possession of cannabis in custodial institutions while clearly

intending to prohibit inmates from smoking or ingesting it. (*Perry*, *supra*, 32 Cal.App.5th at pp. 892-893.) Indeed, the historical fact that "*possession* has been treated as the *more* culpable conduct makes it even more unreasonable to infer that Proposition 64 was meant to affect existing proscriptions against possession of cannabis in prison while expressly *not* affecting proscriptions against its use." (*Id.* at p. 892, original italics.) In addition, the court observed that the need to maintain safety and order in prisons was not affected by Proposition 64. (*Id.* at p. 895.)

The court also observed that "there is nothing in the ballot materials for Proposition 64 to suggest the voters were alerted to or aware of any potential impact of the measure on cannabis in correctional institutions ...." (*Perry*, *supra*, 32 Cal.App.5th at pp. 890, 895.) "The Voter Guide discussed the current state of the law, laws governing medical marijuana, and proposed changes, including limitations on legal use and provisions for regulation and taxation." (*Id.* at pp. 894-895.) But it "did not in any way address the subject of cannabis possession or use in prison." (*Id.* at p. 895.) "The only mention of the subject is in the text of the measure itself and, as we have said, states the opposite intent in the strongest of terms." (*Ibid.*)

In contrast to the *Raybon* court, the *Perry* court held that "[i]t is apparent that Proposition 64, in sections 11362.1 and 11362.45, was intended to maintain the status quo with respect to the legal status of cannabis in prison." (*Perry*, *supra*, 32 Cal.App.5th at pp. 892-893.)

LEGAL BACKGROUND

For well over a century, the Legislature has strictly controlled the flow of contraband—including alcohol and drugs—into state prisons and custodial institutions. It has chosen to punish smuggling, possession, and other contraband violations as felonies. At the same time, views about the accepted uses of cannabis by members of the general public have evolved

significantly over the decades, reflected in changes to the Health and Safety Code. What follows is an abbreviated history of the regulation of cannabis under these separate and historically divergent statutory schemes.

A. The Legislature's Longstanding, Comprehensive, and Prophylactic Approach to Banning Contraband in Custodial Institutions

The Legislature has long recognized that the possession and use of certain items—such as drugs, weapons, and alcohol—within the prison environment "promote[s] disruptive and violent acts in custody," such as "gang involvement in the drug trade." (*People v. Low*, *supra*, 49 Cal.4th 372, 388.) To avoid the evils associated with such contraband items, the Legislature "chose to take a prophylactic approach to the problem by attacking the very presence of [contraband] in prisons and jails." (*People v. Gutierrez* (1997) 52 Cal.App.4th 380, 386.)

The Legislature first enacted a prison contraband law in 1899, making it a felony for any person not authorized by law to bring narcotics, liquor, or weapons into various custodial institutions. (*Low*, *supra*, 49 Cal.4th at pp. 387-388, discussing Stats. 1988, ch. 4, § 1, p. 4.) In 1901, a successor statute similarly made it a felony for any person not authorized by law to bring "any opium, morphine, cocaine, or other narcotic, or any intoxicating liquor of any kind whatever" into various custodial institutions. (Former Pen. Code, § 171a, added by Stats. 1901, ch. 158, § 43, pp. 445-446; see *Low*, *supra*, 49 Cal.4th at pp. 387-388.)

In 1941, "the Legislature overhauled part 3 of the Penal Code, and added title 5, regulating various crimes in custody." (*Low, supra*, 49 Cal.4th at p. 387.) In particular, the Legislature provided that any person, "not authorized by law," who brings into a custodial institution "any narcotic, the possession of which is prohibited by the State Narcotic Act, or any alcoholic beverage, is guilty of a felony." (Former Pen. Code, § 4573,

added by Stats. 1941, ch. 106, § 15, p. 1126.) The reference to the State Narcotic Act was already outdated; when the Legislature enacted the Health and Safety Code in 1939, it had moved the control of narcotics to division 10. (Stats. 1939, ch. 60, pp. 755-776.) The Legislature therefore amended the Penal Code to prohibit bringing into prison "any narcotic, the possession of which is prohibited by Division 10 of the Health and Safety Code ...." (Former Pen. Code, § 4573, as amended by Stats. 1941, ch. 1192, § 15, p. 2965.) In 1949, the Legislature broadened the scope of prohibited activities by making it a felony for any person to have "possession" of certain enumerated items, including "any narcotics, or drugs in any manner, shape, form, dispenser or container, or alcoholic beverage ...." (Former Pen. Code, § 4573.6, added by Stats. 1949, ch. 833, § 3, p. 1583.)

Over the years, the Legislature enacted additional statutes to keep contraband out of the State's custodial institutions. (See, e.g., former Pen. Code, § 4573, as amended by Stats. 1959, ch. 662, § 1, p. 2637 [making it a felony for any person to send or assist in either bringing or sending a controlled substance into a custodial institution]; Pen. Code, § 4573.9, added by Stats. 1990, ch. 1580, § 6, pp. 7556-7557 [making it a felony for any person "other than a person held in custody" to sell, furnish, administer, or give away a controlled substance "to any person held in custody"].) It also increased the existing penalties for bringing, sending, or possessing a controlled substance in a custodial institution by making the offenses punishable by two, three, or four years in prison. (Pen. Code, §§ 4573, 4573.6, as amended by Stats. 1990, ch. 1580, §§ 2, 4, pp. 7554-7556.)

As is relevant here, under the modern code, there are five main statutes addressing alcohol and drugs as contraband in custodial institutions.

Penal Code section 4573.5 prohibits smuggling by providing in relevant part:

> Any person who knowingly brings into any state prison or other institution under the jurisdiction of the Department of Corrections, ... any alcoholic beverage, [or] any drugs, other than controlled substances ... , without having authority so to do by the rules of the Department of Corrections, the rules of the prison, ... , or by the specific authorization of the warden, ... , is guilty of a felony.

(Pen. Code, § 4573.5.) A sibling statute—Penal Code section 4573—addresses the smuggling of drugs that are controlled substances, and provides a higher penalty for violation.[5] It provides in relevant part:

> Except when otherwise authorized by law, or when authorized by the person in charge of the prison ... , any person, who knowingly brings or sends into, or knowingly assists in bringing into, or sending into, any state prison, ... , any controlled substance, the possession of which is prohibited by Division 10 (commencing with Section 11000) of the Health and Safety Code, ... , is guilty of a felony punishable by imprisonment ... for two, three, or four years.

(Pen. Code, § 4573, subd. (a).)

Substantially parallel statutes address unauthorized possession. Penal Code section 4573.8 provides:

> Any person who knowingly has in his or her possession in any state prison, ... , drugs ... , or alcoholic beverages, without being authorized to possess the same by rules of the Department of Corrections, ... , or by the specific authorization of the warden, ... , is guilty of a felony.

(Pen. Code, § 4573.8.) Possession of drugs that are controlled substances is also prohibited and carries a higher penalty under Penal Code section 4573.6, which provides in relevant part:

> Any person who knowingly has in his or her possession in any state prison, ... , any controlled substances, the possession of

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[5] The general term "drug" encompasses the specific term "controlled substances." (See Health & Saf. Code, § 11014.)

> which is prohibited by Division 10 (commencing with Section 11000) of the Health and Safety Code, ... , without being authorized to so possess the same by the rules of the Department of Corrections, rules of the prison ... , or by the specific authorization of the warden, ... , is guilty of a felony punishable by imprisonment ... for two, three, or four years.

(Pen. Code, § 4573.6, subd. (a).)

Finally, Penal Code section 4573.9 provides that any person, other than an inmate, who sells, administers or gives away to an inmate "any controlled substance, the possession of which is prohibited by Division 10" where the recipient is not authorized to possess it is "guilty of a felony punishable by imprisonment ... for two, four, or six years."

The California Department of Corrections (CDCR) regulates the use of any drugs, including controlled substances and over-the-counter medicines. (Cal. Code Regs., tit. 15, § 3016.) Inmates cannot "use, inhale, ingest, inject, or otherwise introduce into their body" nor "possess, manufacture, or have under their control" any "controlled substance, medication, or alcohol, except as specifically authorized by the institution's/facility's health care staff." (*Id.* at subds. (a) & (b).) Inmates are also prohibited from possessing or trading in drug paraphernalia without authorization (*id.* at subd. (c)), and from distributing any controlled substance (*id.* at subd. (d)).[6]

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[6] While doctors may now issue prescriptions for medical cannabis (see discussion of the Compassionate Use Act of 1996 at pages 22-23, *post*), a prescription written by a doctor outside of the prison system does not itself authorize an inmate to have access to and use medical cannabis in prison. None of appellants here possessed a prescription for cannabis in any event.

B. Legalization of the General Public's Use of Cannabis

1. History of the regulation of the general public's use of cannabis

While California's use of criminal sanctions to combat the presence of drugs as contraband in custodial institutions dates back to 1899, it was not until 1909 that the Legislature made it illegal for the general public to possess opium, morphine, cocaine, heroin, and codeine without a prescription. (Stats. 1909, ch. 279, § 4, p. 424.) And it was not until 1913 that the Legislature made it illegal for the general public to possess cannabis in the form of "extracts, tinctures, or other narcotic preparations of hemp, or loco-weed, their preparations or compounds." (Stats. 1913, ch. 342, § 6, p. 697.) The State Narcotic Act of 1929 prohibited any person from possessing "loco weed (cannabis sativa)." (Stats. 1929, ch. 216, § 1, p. 380, as amended Stats. 1935, ch. 813, § 1, p. 2204.) When the Legislature enacted the Health and Safety Code in 1939, the prohibitions of the State Narcotic Act were moved into division 10. (Stats 1939, ch. 60, pp. 755-776.) Division 10 classified cannabis sativa—"marihuana"—as a narcotic. (Former Health & Saf. Code, §§ 11001, subd. (i), 11003, added by Stats. 1939, ch. 60, pp. 755-756.)[7] The possession of a narcotic without a prescription was a "wobbler" punishable as either a felony or a misdemeanor. (Former Health & Saf. Code, § 11712, added by Stats. 1939, ch. 60, p. 771, amended by Stats. 1940 1st Ex. Sess, ch. 9, § 37, p. 24.)

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[7] Specifically, the Legislature defined a narcotic as including "[a]ll parts of the plant cannabis sativa L." and materials derived from the plant. (Former Health & Saf. Code, § 11001, subd. (i), added by Stats. 1939, ch. 60, p. 755.) The Legislature further defined cannabis sativa to include "hemp, Indian hemp, loco weed, or marihuana." (Former Health & Saf. Code, § 11003, added by Stats. 1939, ch. 60, p. 756.)

In 1961, the Legislature increased the punishment for the possession of a narcotic "other than marijuana," making it a felony punishable by two to ten years in state prison. (Former Health & Saf. Code, § 11500, as amended by Stats. 1961, ch. 274, § 1, p. 1301.) But the possession of marijuana remained a wobbler. (Former Health & Saf. Code, § 11350, as amended by Stats. 1961, ch. 274, § 7, p. 1305.)

In 1975, the Legislature decreased the penalty for the possession of marijuana, making it punishable only as a misdemeanor. (Former Health & Saf. Code, § 11357, as amended by Stats. 1975, ch. 248, § 2, pp. 641-642.) If the marijuana weighed more than one ounce, the offense carried a jail term of not more than six months and a fine of not more than $500. (Former Health & Saf. Code, § 11357, subd. (c).) If the marijuana weighed one ounce or less, the offense carried a fine of not more than $100; no jail time could be imposed. (Former Health & Saf. Code, § 11357, subd. (b).)

In 1983, the Legislature created special penalties for marijuana possession on school grounds. (Former Health & Saf. Code, § 11357, subd. (d), added by Stats. 1982, ch. 1287, § 1, p. 4759.) Possession of not more than one ounce of marijuana was punishable by up to ten days in jail and a fine of up to $500 if the possession was by an adult "upon the grounds of, or within, any school providing instruction in kindergarten or, any of grades 1 through 12 inclusive, during hours in which the school is open for classes or school-related programs ...." (*Ibid.*)

In 1996, the voters passed Proposition 215, the Compassionate Use Act, making California the first State to legalize the possession of medical marijuana. (Health & Saf. Code, § 11362.5, added by Prop. 215, § 1, approved by voters, Gen. Elec. (Nov. 5, 1996).) The Act operated by creating an affirmative defense; statutes prohibiting the possession and 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." (Health & Saf. Code, § 11362.5, subd. (d); see *People v. Kelly* (2010) 47 Cal.4th 1008, 1012, 1014.) After Proposition 215, a correctional institution may permit medicinal uses of marijuana in circumstances that do not endanger security or safety, but is not required to do so. (Health & Saf. Code, § 11362.785, subd. (c).)

In 2010, the Legislature reclassified the possession of not more than 28.5 grams (roughly one ounce) of marijuana as an infraction rather than a misdemeanor. (Former Health & Saf. Code, § 11357, subd. (b), as amended by Stats. 2010, ch. 708, § 1.) The possession of more than 28.5 grams of marijuana remained a misdemeanor punishable by not more than six months in jail and fine of not more than $500. (Former Health & Saf. Code, § 11357, subd. (c), as amended by Stats. 2010, ch. 708, § 1.)

2. Proposition 64: The Control, Regulate and Tax Adult Use of Marijuana Act (2016)

On November 8, 2016, California voters enacted the Control, Regulate and Tax Adult Use of Marijuana Act, Proposition 64. The Voter Guide devoted approximately 44 pages to the initiative. The ballot title and summary, prepared by the Attorney General, described the subject as "Marijuana Legalization," and provided a bullet-point synopsis of the initiative as follows:

- Legalizes marijuana under state law, for use by adults 21 or older.
- Designates state agencies to license and regulate marijuana industry.
- Imposes state excise tax of 15% on retail sales of marijuana, and state cultivation taxes on marijuana of $9.25 per ounce of flowers and $2.75 per ounce of leaves.
- Exempts medical marijuana from some taxation.

- Establishes packaging, labeling, advertising, and marketing standards and restrictions for marijuana products.
- Prohibits marketing and advertising marijuana directly to minors.
- Allows local regulation and taxation of marijuana.
- Authorizes resentencing and destruction of records for prior marijuana convictions.

(Voter Guide, *supra*, at pp. 14-15.)

The "Background" section of the analysis by the Legislative Analyst first described existing laws applicable to the general public. (Voter Guide, *supra*, at pp. 90-92.) It stated, "[f]or example," that "possession of less than one ounce of marijuana (the equivalent of roughly 40 marijuana cigarettes, also known as 'joints') is punishable by a fine ...." (*Id.* at p. 90; see also *id.* at p. 94.) It then described the measure. (*Id.* at pp. 92-97.) It reported that the "measure (1) legalizes adult nonmedical use of marijuana, (2) creates a system for regulating nonmedical marijuana businesses, (3) imposes taxes on marijuana, and (4) changes penalties for marijuana-related crimes." (*Id.* at p. 92.) The Legislative Analyst also noted that "individuals serving sentences for activities that are made legal or are subject to lesser penalties under the measure would be eligible for resentencing." (*Id.* at p. 95.)

Arguments in favor of the measure contended that Proposition 64 "creates a safe, legal, and comprehensive system for adult use of marijuana while protecting our children." (Voter Guide, *supra*, at p. 98.) Opponents identified what they characterized as "five huge flaws" in the measure. (*Id.* at pp. 98-99.) They predicted increased highway deaths; marijuana growing nears schools and parks; organized crime entering the new market; a rollback of the ban on smoking ads on television; and adverse impacts to underprivileged neighborhoods. (*Id.* at p. 99.) None of the arguments, pro

or con, discussed any potential effects on prison contraband laws. (*Id.* at pp. 98-99.)

The text of Proposition 64 was laid out in the 32 pages that followed. (Voter Guide, *supra*, at pp. 178-210.) The text begins with a set of uncodified Findings and Declarations. Among other things, the new law was intended to "incapacitate the black market, and move marijuana purchases into a legal structure with strict safeguards against children accessing it." (*Id.* at p. 178; see also *id.* at p. 179.)

The initiative amended Health and Safety Code section 11357 to eliminate the penalty for the simple possession of not more than 28.5 grams of cannabis, or not more than eight grams of concentrated cannabis, by a person 21 years of age or older. (Voter Guide, *supra*, at p. 204; Health & Saf. Code, § 11357, as amended by Prop. 64, § 8.1.) But the possession of cannabis remained an infraction for adults under the age of 21 and for juveniles under the age of 18. (Voter Guide, at p. 204; Health & Saf. Code, § 11357, subds. (a)(1), (2), as amended by Prop. 64, § 8.1.) In addition, the possession of cannabis remained a crime "upon the grounds of, or within, any school providing instruction in kindergarten or any of grades 1 to 12, inclusive, during hours the school is open for classes or school-related programs ... ." (Voter Guide, at p. 204; Health & Saf. Code, § 11357, subds. (c), (d); see also Health & Saf. Code, § 11362.3, subd. (a)(5).)

The initiative also added Health and Safety Code section 11362.1, which provides that certain conduct related to small amounts of cannabis by persons 21 years of age or older "shall be lawful under state and local law, and shall not be a violation of state or local law." (Voter Guide, *supra*, at p. 180; Health & Saf. Code, § 11362.1, subd. (a), added by Prop. 64, § 4.4.) The statute provided that it "shall be lawful" to "[p]ossess, process, transport, purchase, obtain, or give away to persons 21 years of age or older without any compensation whatsoever, not more than 28.5 grams of

marijuana not in the form of concentrated cannabis" or "not more than eight grams of marijuana in the form of concentrated cannabis ... ." (Health & Saf. Code, § 11362.1, subd. (a)(1)-(2), as added by Prop. 64, § 4.4.)[8] It also made it lawful to "[s]moke or ingest marijuana or marijuana products." (*Id.* at subd. (a)(4).)

The legalization provisions in Health and Safety Code section 11362.1 apply "notwithstanding any other provision of law" but "[s]ubject to" four provisions in the Health and Safety Code—specifically, sections 11362.2, 11362.3, 11362.4, and 11362.45. (Health & Saf. Code, § 11362.1, subd. (a).) Section 11362.2 places certain restrictions on personal cultivation of cannabis. Section 11362.3 makes it a crime to, among other things, possess an open container of cannabis in a motor vehicle (*id.* at § 11362.3, subd. (a)(4)) or to possess cannabis on the grounds of a school, day care center, or youth center while children are present (*id.* at subd. (a)(5)). It is also a crime to smoke cannabis in various locations, such as in a public place (*id.* at subd. (a)(1)), in a location where smoking tobacco is prohibited (*id.* at subd. (a)(2)), within 1,000 feet of a school (*id.* at subd. (a)(3)), on the grounds of school (*id.* at subd. (a)(5)), while operating a motor vehicle (*id.* at subd. (a)(7)), and while riding in a motor vehicle (*id.* at subd. (a)(8)). The provisions also make it a crime to "ingest" cannabis in some, but not all, of the circumstances in which it is a crime to smoke it. (Compare *id.* at subds. (a)(1), (5), (7), (8) [referring to both smoking and ingesting] with *id.* at subds. (a)(2), (3) [referring only to smoking].) References to smoking include vaping. (*Id.* at subd. (c).) Penalties for the violations set out in section 11362.3 are set out in section 11362.4.

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[8] As previously mentioned, the Legislature promptly amended the statutes to refer to "cannabis" rather than "marijuana." (Stats. 2017, ch. 27, §§ 113-160.)

The final "subject to" provision—Health and Safety Code section 11362.45—lists various laws, obligations, abilities, and rights that Proposition 64 does *not* "amend, repeal, affect, restrict, or preempt." (Voter Guide, *supra*, at p. 182; Health & Saf. Code, § 11362.45.) Among the exempt laws are those prohibiting the operation a vehicle while smoking, ingesting, or impaired by cannabis (Health & Saf. Code, § 11362.45, subd. (a)), prohibiting activities involving a person under 21 years of age (*id.* at subd. (b)), prohibiting activities by a person under 21 years of age (*id.* at subd. (c)), and laws providing that it would constitute negligence or professional malpractice to undertake any task while impaired from smoking or ingesting cannabis (*id.* at subd. (e)).

As relevant here, Health and Safety Code section 11362.45 also provides that Proposition 64 does not "amend, repeal, affect, restrict, or preempt laws … pertaining to smoking or ingesting cannabis ... on the grounds of ... any facility or institution under the jurisdiction of the Department of Corrections and Rehabilitation or the Division of Juvenile Justice, or on the grounds of, or within, any other facility or institution referenced in Section 4573 of the Penal Code." (*Id.* at subd. (d), as added by Prop. 64, § 4.8.) This is the only specific reference to the Department of Corrections and Rehabilitation or to state custodial facilities in the ballot materials.

Proposition 64 also added new provisions to the Health and Safety Code allowing for relief from pre-initiative cannabis convictions in certain circumstances. For example, section 11361.8, subdivision (a) provides that "[a] person currently serving a sentence for a conviction, … who would not have been guilty of an offense, or who would have been guilty of a lesser offense" under Proposition 64 "had that act been in effect at the time of the offense" may petition for retroactive relief. Specifically, such a person may petition for "resentencing or dismissal in accordance with Sections 11357

[possession], 11358 [cultivation], 11359 [possession for sale], 11360 [transport and sale], 11362.1 [lawful activities], 11362.2 [personal cultivation], 11362.3 [prohibited activities], and 11362.4 [punishment for prohibited activities] as those sections have been amended or added by that act." (Health & Saf. Code, § 11361.8, subd. (a); Voter Guide, *supra*, p. 207.)

Much of the remainder of Proposition 64 addresses the establishment "of a comprehensive system to control and regulate the cultivation, distribution, transport, storage, manufacturing, processing, and sale of nonmedical marijuana and marijuana products for adults 21 years of age and over" (Voter Guide, *supra*, at pp. 183-198; see Bus. & Prof. Code, Div. 10, "Cannabis," §§ 26000-26211) and imposition and collection of taxes in the newly created cannabis marketplace (Voter Guide, at pp. 198-204; Rev. & Tax. Code, §§ 34010-34021.5). A variety of state entities are specifically enlisted in the effort, including the Bureau of Medical Marijuana Regulation, the Department of Consumer Affairs, the Department of Food and Agriculture, and the Department of Public Health (Voter Guide, at pp. 184-185; Bus. & Prof. Code, §§ 26010, subd. (a), 26012, subd. (a)) and, as to taxes, the Board of Equalization (Voter Guide, at pp. 198-199; Rev. & Tax. Code, §§ 30410, subd. (a), 34013). The California Department of Corrections and Rehabilitation is not referenced in these parts of the initiative.

SUMMARY OF ARGUMENT

The question of whether Proposition 64 legalized the possession of cannabis in custodial institutions is one of statutory interpretation and ultimately of the voters' intent.

The answer to this question does not turn on what the Legislature intended when it imposed increased penalties for prison contraband

violations involving drugs that are also controlled substances "the possession of which is prohibited by Division 10 ...." (See, e.g., Penal Code § 4573.6.) Changes to division 10 resulting from Proposition 64 may affect current charging and sentencing decisions under the contraband statutes. For example, today, a prosecutor might choose to charge the unauthorized possession of 28.5 grams of cannabis by a person 21 years of age or older in a custodial institution as a violation of both Penal Code section 4573.6 and, in the alterative, Penal Code section 4573.8. Such adjustment is the natural result of the Legislature's decision to employ a cross-reference in the felony contraband statutes. But that effect is a far cry from completely excepting cannabis from its status as contraband.

The answer to whether the voters in 2016 legalized possession of cannabis in the State's prisons, juvenile justice facilities, and other custodial institutions instead turns on the meaning of the savings clause in Health and Safety Code section 11362.45, subdivision (d). That provision excepts from Proposition 64's sweep "[l]aws pertaining to smoking or ingesting" cannabis in custodial institutions. (Health & Saf. Code, § 11362.45, subd. (d).) The broad "pertaining to" language demonstrates that the voters intended to leave undisturbed laws relating to cannabis in custodial institutions, exempting this broad category of laws from the legalization effected by Proposition 64. The comprehensive contraband statutes in the Penal Code fall within this broad savings clause, because they are aimed at interdicting the supply of contraband cannabis before inmates have the chance to smoke or ingest it.

To the extent the plain language of the savings clause is not dispositive, extrinsic evidence supports the view that the voters did not intent to repeal or otherwise affect prison contraband laws. The Voter Guide gave no notice of any such effect. Rather, the Guide focused on issues surrounding cannabis use by members of the general public and

creation of a regulated marketplace facilitating the same. It did not suggest that a "yes" vote would open the door to smuggling and possessing cannabis in custodial institutions. And a contrary reading that would legalize cannabis in custodial institutions would produce results that are not only inconsistent within the contraband statutes but also inconsistent the stated purposes of Proposition 64. To take but one example, Proposition 64 was intended to create a legal and regulated marketplace for the recreational use of cannabis by the general public, not to undermine longstanding laws designed to prevent a black market in contraband and unauthorized drug trafficking in state prisons.

Proposition 64 did not contain the "formally expressed intent" necessary to jettison the longstanding, comprehensive scheme addressing cannabis as a form of contraband in custodial institutions. (*Ross*, *supra*, 42 Cal.4th at p. 930.)

ARGUMENT

I. THIS APPEAL DOES NOT TURN ON THE INTERPRETATION OF PENAL CODE SECTION 4573.6, BUT INSTEAD ON THE INTERPRETATION OF PROPOSITION 64

Appellants and the Court of Appeal focused largely on the language of Penal Code section 4573.6, suggesting that appellants' right to relief turns on the proper interpretation of that provision's cross-reference to division 10 of the Health and Safety Code. It does not.

As noted, Penal Code section 4573.6 prohibits the unauthorized possession in prison of "any controlled substances, the possession of which is prohibited by Division 10 (commencing with section 11000) of the Health and Safety Code[.]" (Pen. Code, § 4573.6, subd. (a); see also Health & Saf. Code, §§ 4573 [smuggling controlled substance], 4573.9 [selling or furnishing controlled substance].) The Court of Appeal held that if a particular instance of possession would be permitted when committed by a

member of the general public outside the prison context, then that possession is necessarily also permitted and lawful when committed in the prison context. (*Raybon*, *supra*, 36 Cal.App.5th at pp. 120-121; see also *id.* at p. 113 ["possession of less than an ounce of cannabis in prison is no longer a felony"].) That is incorrect.

Granted, the Legislature's decision to cross-reference division 10 of the Health and Safety Code means that the scope of Penal Code section 4573.6 and similar provisions related to controlled substances in custodial institutions may change prospectively as division 10 and the regulatory environment changes. For example, unless and until a drug is regulated under division 10, unauthorized possession by an inmate is properly charged under Penal Code section 4573.8, making it a felony to knowingly possess drugs or alcohol in the custodial context. (Penal Code, § 4573.8.) If the drug is added as a controlled substance to division 10, as, for example, ketamine was in 1991 (see Stats. 1991, ch. 294, § 1, pp. 1823-1825, amending Health & Saf. Code, § 11056), possession in the custodial context after that date is properly charged under section 4573.6—also a felony but with enhanced penalties.

Here, at most, the changes to Health and Safety Code section 11357 and the enactment of Health and Safety Code section 11362.1, making it "lawful" to possess 28.5 grams of cannabis as a general proposition, may cause prosecutors to charge possession by inmates as a violation of section 4573.8 instead of or in addition to a violation of section 4573.6. As the court in *Perry* noted, arguably, "[t]he literal terms of these Penal Code sections and Health and Safety Code section 11357 can be read to support the proposition that possession of a small amount of cannabis by an adult is no longer 'prohibited by Division 10' as required for conviction under Penal Code section 4573.6." (*Perry*, *supra*, 32 Cal.App.5th at p. 896, fn. 10.) This same type of adjustment in charging decision might occur if a

drug that previously was available only by prescription became available over-the-counter. But even under this reading of sections 4573.6 and 4573.8, unauthorized possession of cannabis in prison—just like unauthorized possession of alcohol in prison—is still a felony.

The People note that there may be additional prospective complications in applying the smuggling contraband statutes, Penal Code sections 4573 and 4573.5, to alleged violations that occur after Proposition 64, because unlike the possession contraband statutes, the textual references to controlled substances in those two statutes do not fit together perfectly. Section 4573 refers to "controlled substances, the possession of which is prohibited by Division 10," and section 4573.5 refers to "any drugs, other than controlled substances" without reference to division 10. Due to this textual mismatch, appellate courts have had difficulty where an individual attempted to smuggle a *prescribed* controlled substance into prison, because division 10—specifically Health and Safety Code section 11350, subdivision (a)—prohibits possession of a controlled substance "unless upon the written prescription of a physician." In *Fenton*, the court held that the act of smuggling a prescribed substance does not violate section 4573, because division 10 of the Health and Safety Code does not prohibit the possession of a prescribed substance. (*Fenton*, *supra*, 20 Cal.App.4th at pp. 969-971.) In *People v. Harris* (2006) 145 Cal.App.4th 1456, the Court of Appeal took things one step further, holding that smuggling a prescribed substance also cannot violate section 4573.5, because the statute does not apply to controlled substances. In the People's view, these cases have read an unintended loophole into the contraband smuggling statutes—one that

defendants charged with smuggling small amounts of cannabis into prisons may also attempt to exploit.[9]

Whatever challenges prosecutors and courts may face in applying the Penal Code contraband statues to cannabis-related violations occurring after the enactment of Proposition 64 are not relevant to the appeal before this Court. Appellants' convictions for violating Penal Code section 4573.6 were indisputably lawful and final before Proposition 64 went into effect. As such, appellants' entitlement to relief depends on effect of Proposition 64's savings clause in Health and Safety Code section 11362.45, and its retroactive relief provision in Health and Safety Code section 11361.8. Appellants must establish not only that the voters intended to repeal or amend the prison contraband statutes, but also that they intended that inmates with valid contraband convictions would be entitled to retroactive resentencing or outright dismissal of their convictions.

Appellants cannot make such a showing.

II. THE VOTERS DID NOT INTEND TO DISRUPT THE COMPREHENSIVE CUSTODIAL CONTRABAND LAWS OR UNDO CONTRABAND CONVICTIONS

There can be no doubt that Proposition 64 reflects an evolving view of cannabis from the perspective of the general public's health and safety. But, as this Court has observed, laws regulating contraband substances in state

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[9] The Legislature allows no similar exception for acts of smuggling involving alcohol, drugs that are not classified as controlled substances, and drug paraphernalia. "[I]t is difficult to view any introduction of drugs into a prison ... as being an innocuous act." (*United States v. Park* (9th Cir. 1975) 521 F.2d 1381, 1384-1385.) "While a visitor may outside the prison grounds be legally entitled to carry a gun or use medication, the government has a great and legitimate interest in seeing that these items are not brought ... onto prison facilities." (*Id.* at p. 1385.) Fortunately, many acts of smuggling drugs into prison also violate the contraband possession statutes, so the offending acts are subject to appropriate punishment.

prisons and other custodial institutions must be viewed not only from the perspective of public health and safety but also from the perspective of institutional security. (See *People v. Low*, *supra*, 49 Cal.4th at pp. 388, 391; see also *Pell v. Procunier*, *supra*, 417 U.S. at p. 823.) It is apparent that the voters did not intend for Proposition 64 to legalize the possession of cannabis in custodial institutions without administrative authorization.

A. Legal Standard: Interpreting Initiatives

The question of whether Proposition 64 legalized the possession of cannabis in custodial institutions is one of statutory interpretation. Just as courts must determine the Legislature's intent in interpreting statutes enacted by that body, so too must they discern the voters' intent in interpreting statutes enacted by initiative. (*Valencia, supra*, 3 Cal.5th at p. 357; see also *Ross, supra*, 42 Cal.4th at p. 387.)

Courts first consider the initiative's language. (*Valencia, supra,* 3 Cal.5th at p. 357.) "If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language." (*People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 571.) But courts should not rush to deem an initiative clear on its face by considering only individual words and phrases. (See, e.g., *Valencia, supra*, 3 Cal.5th at pp. 357-360.) "'[T]he words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.'" (*Id.* at pp. 357-358, citing *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.) "[S]tatutory language, even if it appears to have a clear and plain meaning when considered in isolation, may nonetheless be rendered ambiguous when the language is read in light

of the statute as a whole or in light of the overall legislative scheme." (*Id.* at p. 360.)

Where the text is ambiguous, courts may consider extrinsic sources, such as ballot summaries and arguments, in determining the voters' intent. (*Valencia, supra*, 3 Cal.5th at p. 364.) While voters are presumed to know the existing law (*Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 855), voters do not have the entirety of the California codes before them, nor do they have the opportunity to deliberate over and amend legislative proposals. Voters may only vote "yes" or "no" based on the materials before them. Courts are thus careful in determining the scope and reach of initiatives. They "'cannot presume that ... the voters intended the initiative to effect a change in law that was not expressed or strongly implied in either the text of the initiative or the analyses and arguments in the official ballot pamphlet.'" (*Valencia, supra*, 5 Cal.5th at p. 364, quoting *Farmers Ins. Exchange, supra*, 137 Cal.App.4th at pp. 857-858.) In addition, "[w]here uncertainty exists" about the voters' intent, "consideration should be given to the consequences that will flow from a particular interpretation." (*Id.* at p. 358.)

B. The Voters Did Not Intend to Amend or Repeal the Contraband Statutes

The issue of whether Proposition 64 legalized the possession of cannabis in custodial institutions depends on the meaning of the savings clause in Health and Safety Code section 11362.45, subdivision (d). Again, the clause excepts from Proposition 64's legalization provision "[l]aws pertaining to smoking or ingesting cannabis or cannabis products on the grounds of, or within, any facility or institution under the jurisdiction of the Department of Corrections and Rehabilitation or the Division of Juvenile Justice, or on the grounds of, or within, any other facility or institution

referenced in Section 4573 of the Penal Code." (Health & Saf. Code, § 11362.45, subd. (d).)

1. A plain reading of the savings clause, in context, establishes that Proposition 64 did not legalize the possession of cannabis in custodial institutions

The text and context of the savings clause, excepting certain laws and actions from the sweep of Proposition 64's legalization provision (Health & Saf. Code, § 11362.1) establish that the voters did not intent to repeal or otherwise affect contraband laws prohibiting the smuggling, possession, and trafficking of cannabis in prison.

The savings statute protects an expansive set of laws, rights, obligations, and abilities that the legalization statute does not "amend, repeal, affect, restrict, or preempt," including laws prohibiting impaired driving, laws designed to prevent children from accessing cannabis, and laws about professional malpractice and drug- and alcohol-free workplaces and state buildings. (Health & Saf. Code, § 11362.45, subd. (a)-(c), (e)-(h); see discussion at page 27, *ante*.) The particular savings clause at issue here refers to laws "pertaining to" smoking or ingesting cannabis in custodial institutions. (Health & Saf. Code, § 11362.45, subd. (d).) In common usage, that phrase is quite broad. One dictionary defines the verb "pertain" as meaning "[t]o relate directly to; to concern or have to do with." (Black's Law Dict. (11th ed. 2019).) Another defines it as meaning "to belong as an attribute, feature, or function." (Merriam-Webster's Collegiate Dict. (10th Ed. 2000) p. 866, col. 1.) Still another defines it as meaning "to belong or be connected as a part, adjunct, possession, or attribute." (Random House Webster's Unabridged Dict. (2nd Ed. 1987) p. 1447, col. 1.) Given these broad definitions, it is reasonable to assume that voters intended to save not only laws focused narrowly on prohibiting smoking or ingesting cannabis

in custodial institutions, but also laws that relate to, are concerned with, or are adjunct to such activity.

Penal Code section 4573.6 and the other contraband statutes are well within the broad language of the savings clause. The contraband statutes "pertain" or "relate" to smoking or ingesting cannabis in custodial institutions because at least one of the "evil[s]" that "the Legislature was concerned was drug use by prisoners." (*Gutierrez, supra*, 52 Cal.App.4th at p. 386.) By "attacking the very presence of drugs and drug paraphernalia in prisons and jails," the statutes aim to interdict cannabis and other contraband before it can be consumed. (*Ibid.*) And, as the *Perry* court noted, there is little purpose for possessing 28.5 grams or less of cannabis in a custodial institution other than for someone in that institution ultimately to smoke or ingest it. (*Perry, supra*, 32 Cal.App.5th 885.) Moreover, if the voters meant to limit Health and Safety Code section 11362.45 to laws that are focused narrowly on smoking or ingesting, one would expect the exception to cover "[l]aws prohibiting smoking or ingesting marijuana" in the custodial context, rather than laws "pertaining to" the same. Under this reasonable reading, Penal Code section 4573.6 is well within the plain language of the savings clause.

The Court of Appeal attempted to give a different and more narrow effect to "pertaining to" by positing that "[t]he purpose of the language is to describe the vast array of means of consumption," such as when cannabis is "inhaled as a non-burning vapor or applied topically such that it is absorbed through the skin." (*Raybon, supra*, 36 Cal.App.5th at p. 122.) If that were a correct reading, one would expect to see the "pertaining to" language in other parts of the Act. For example, one would expect to see the "pertaining to" language in the savings clause that excepts "[l]aws providing that it would constitute negligence or professional malpractice to undertake any task while impaired from smoking or ingesting cannabis or

cannabis products." (Health & Saf. Code, § 11362.45, subd. (e).) So too would one expect to see the "pertaining to" language in the savings clause referring to laws "making it unlawful to drive or operate a vehicle ... while smoking, ingesting, or impaired by, cannabis ... ." (Health & Saf. Code, § 11362.45, subd. (a).) The fact that the "pertaining to" language is missing from those other clauses demonstrates that the construction of the "pertaining to" language offered by the appellate court below is unreasonable.

Indeed, if Health and Safety Code section 11362.45, subdivision (d) does not except the prison contraband statutes from the scope of Proposition 64's legalization provision, one may reasonably ask what purpose it serves. It is true that Proposition 64 enacted *new* prohibitions in Health and Safety Code section 11362.3 on smoking or ingesting cannabis in a public place or in a place where smoking tobacco is prohibited. (Health & Saf. Code, § 11362.3, subds. (a)(1), (2).) These new prohibitions presumably would allow a prosecutor to charge smoking or ingesting cannabis in a custodial institution as an infraction, just as it would be an infraction to take the same actions in a public place. (See *id.* at § 11362.4, subds. (a), (b).) But construing the savings clause as excepting these new prohibitions would render the clause superfluous. This is so because the legalization statute itself provides that it is subject to the new prohibitions in Health and Safety Code section 11362.3. (*Id.* at § 11362.1.) As a result, the only way to make the savings clause effectual is to construe it as saving laws pre-dating Proposition 64 that relate to cannabis use in prison, as Penal Code section 4573.6 and other contraband statutes do.

Construing "pertaining to" as it appears in Health and Safety Code section 11362.45, subdivision (d) to mean "relating to" is consistent with use of the term elsewhere in Proposition 64. For example, the savings statute also excepts "[l]aws pertaining to the Compassionate Use Act of

1996." (Health & Saf. Code, § 11362.45, subd. (*i*).) In this context, the "pertaining to" language must incorporate more than just the Compassionate Use Act, because that Act consists of only one solitary statute. (Health & Saf. Code, § 11362.5, subd. (a).) And the Compassionate Use Act provides an affirmative defense only as to a prosecution for violating "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana ...." (*Id.* at subd. (d).) In contrast, the Medical Marijuana Program applies to "Section 11357, 11358, 11359, 11360, 11366, 11366.5, [and] 11570." (*Id.* at § 11362.765, subd. (a).) When the voters specified that Proposition 64 would not affect laws "pertaining to" the Compassionate Use Act, they presumably intended to incorporate the related Medical Marijuana Program even though it is not part of the Act in a strict sense. (See *People v. Kelly*, *supra*, 47 Cal.4th at p. 1014.) Other use of "pertaining to" suggest it should be construed broadly as "relating to." (See, e.g., Voter Guide, *supra*, at p. 180, [law will "[a]llow public and private employers to enact and enforce workplace policies pertaining to marijuana"]; Voter Guide, at p. 191, Business and Prof. Code, § 26067, subd. (a) ["secretary [of the Department of Food and Agriculture] shall administer this section as it pertains to the cultivation of marijuana"]; Voter Guide, at p. 206, Health & Saf. Code, § 11351.5, subd. (b)(4) [application for "for destruction of records pertaining to the arrest or conviction"].)

The fact that the savings clause does not refer directly to laws pertaining to "possessing" cannabis in addition to smoking or ingesting it in a custodial institution is of no moment. As discussed, the prison contraband statutes prohibit not only possessing contraband but also bringing, sending, selling, furnishing, administering, or giving it away. (Pen. Code, §§ 4573, 4573.5, 4573.6, 4573.8, 4573.9; Welf. & Inst. Code, §§ 871.5, 1001.5.) The statutes also prohibit assisting in these activities or

offering to do the same. (Pen. Code, §§ 4573, 4573.9.) All of these prohibitions "pertain to" smoking or ingesting cannabis in a custodial institution, because they are all part of the prophylactic approach of interdicting cannabis, thereby preventing its use. By using the broad phrase "pertaining to," the voters excepted the entire prison contraband scheme efficiently, without needing to list each incorporated statute or prohibited act individually.

2. The ballot materials confirm that the voters did not intend to legalize the possession of cannabis in custodial institutions

The text of Health and Safety Code section 11362.45 is dispositive. But if this Court determines there is some lingering ambiguity, the Voter Guide confirms that voters did not intend to legalize cannabis possession or any other banned action related to cannabis in the State's custodial institutions.

As previously mentioned, the Voter Guide provided extensive analyses on Proposition 64. But the analyses did not mention the contraband statutes or suggest that Proposition 64 would amend or repeal them. For example, the Attorney General's official title and summary said nothing about the legalization of cannabis as a form of contraband in custodial institutions. (Voter Guide, Gen. Elec. (Nov. 8, 2016) at p. 90.) If "the Attorney General had omitted a key provision" from the title and summary of Proposition 64, "the initiative's drafters should have brought this to her attention during the measure's public review period. [Citations.] Their failure to do so suggests no such change was contemplated." (*Valencia*, *supra*, 3 Cal.5th at p. 371, citing Elec. Code, §§ 9002, subd. (a), 9004, subd. (a).)

Similarly, the Legislative Analyst did not mention the felony contraband statutes when describing existing law, saying only that the

possession of less than one ounce of cannabis was "currently punishable by a $100 fine." (Voter Guide, *supra*, at p. 94.) And though the Legislative Analyst included a section on the "Effects on State and Local Costs" (*id.* at p. 96), it included no mention of the costs associated with legalizing the possession and trade of cannabis in custodial institutions. (*Id.* at pp. 95-97.) This omission is particularly significant if, as the Court of Appeal here suggested, prison officials could use administrative discipline to fill the void left by the repeal of the prison contraband statutes. (See *Raybon*, *supra*, 36 Cal.App.5th at pp. 117, 119.)

In short, the analytical materials for Proposition 64 "signaled no relationship at all" between the measure and the contraband statutes. (*Valencia*, *supra*, 3 Cal.5th at p. 367.) Because the narrow reading of the saving clause advanced by appellants and adopted by the Court of Appeal was "apparently opaque to the Attorney General and the Legislative Analyst," it was "almost certainly opaque to the average voter as well." (*Valencia*, *supra*, 3 Cal.5th at p. 371.)

Nothing in the arguments for and against the passage of Proposition 64 suggested that a "yes" vote would amend or repeal prison contraband laws. As with the nonpartisan analyses, neither the proponents not the opponents of Proposition 64 suggested that there would be any effect on the possession of cannabis in custodial institutions. (Voter Guide, Gen. Elec. (Nov. 8, 2016) at pp. 98-99.) As is often the case, the initiative proponents' "'arguments reveal a delicate tightrope walk designed to induce voter approval[.]'" (See *Ross, supra*, 42 Cal.4th at p. 930.) Their pitch about the current "broken system" focused on the unregulated accessibility of cannabis for members of the general public, and the benefits of creating an open, legal, and regulated market for adult recreational use. (Voter Guide, at p. 98.) The proponents did not suggest that prison contraband laws as applied to cannabis were similarly "broken" and should be repealed. The

People recognize that "the materials in the ballot pamphlet may not touch on every aspect of an initiative, no matter how minor." (*Valencia*, *supra*, 3 Cal.5th at p. 364, fn. 6.) But the decriminalization of longstanding prison contraband violations—offenses that long had been classified as a felonies—"is a matter of such substantial import that the voters could reasonably expect that ... the ballot materials would mention it." (*Ibid.*; see also *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, pp. 260-261 ["drafters of legislation 'do [ ] not, one might say, hide elephants in mouseholes'"].) Likewise, "it would seem logical to conclude" that the early release of inmates who had proven themselves incapable of obeying the law even while in prison "would matter to voters." (*Valencia*, *supra*, 3 Cal.5th at p. 366, fn. 7, italics omitted.)

Even voters sophisticated enough to read the uncodified prefatory sections of Proposition 64 would have received no notice that the measure supposedly legalized the possession of cannabis in custodial institutions. The contraband statutes are not mentioned anywhere in the uncodified findings, declarations, purposes, and intents. (Voter Guide, *supra*, at pp. 178-180, Prop. 64, §§ 2, 3.) Moreover, the legalization of cannabis in custodial institutions would be contrary to several of the findings stated in the uncodified provisions. For example, it would be inconsistent with the finding that Proposition 64 would "continue to allow prosecutors to charge the most serious marijuana-related offenses as felonies." (Voter Guide, at p. 179, Prop. 64, § 2, para. G.) So too is legalizing the adult possession of cannabis in facilities under the jurisdiction of the Division of Juvenile Justice inconsistent with the finding that Proposition 64 would "protect children." (Voter Guide, at p. 178, Prop. 64, § 2, para. A.) And legalizing the possession of cannabis in prison is inconsistent with the finding that Proposition 64 would "incapacitate the black market." (*Id.* at para. D.) The purpose of the prison contraband provisions include preventing the use of

drugs, including cannabis, as currency in a "drug trade" that leads to "violent acts in custody" and fuels gang activity. (*Low*, *supra*, 49 Cal.4th at p. 388.) While the voters reasonably understood that Proposition 64 would create a legal, regulated market accessible to adult members of the general public, they were not warned that it could facilitate an underground market for cannabis in the prison context.

The most careful of voters would have had no reason to believe that Proposition 64 would alter the comprehensive statutory scheme addressing cannabis and other controlled substances as contraband in custodial institutions.

3. Reading Proposition 64 to repeal the prison contraband statutes would lead to unreasonable and unintended consequences

Construing Health and Safety Code section 11362.45, subdivision (d) narrowly to exempt only laws focused on the smoking or ingesting of cannabis in the custodial context, and to make all other cannabis-related actions "lawful" under Health and Safety Code section 11362.1, would produce serious adverse consequences that cannot have been intended by the voters.

A narrow reading of the saving clause would legalize not only the possession of 28.5 grams of cannabis or 8 grams of concentrated cannabis by inmates (Health and Saf. Code, § 11362.1, subd. (a)(1), (2)), but also apparently inmates' possession, transport, manufacture, and giving away cannabis accessories (*id.* at subd. (a)(5)). And, by logical extension, cannabis and cannabis accessories in an inmate's "lawful" possession would also "be deemed lawful" and "*not contraband* not subject to seizure ... ." (*Id.* at subd. (c), italics added.) Nothing positive would come from what is effectively a wholesale repeal of the prison contraband laws as they apply to cannabis. As the court in *Gutierrez* noted, the mere presence

of contraband in prisons has harmful effects. It held that the prohibition on possessing drug paraphernalia in a custodial institution applied to a hypodermic syringe because "[e]ven assuming defendant did not intend the syringe to be used to inject drugs, its mere presence in the jail posed the threat that *some* prisoner *would* use it for this purpose." (*Gutierrez*, *supra*, 52 Cal.App.4th at p. 387, original italics.) In *Low*, this Court similarly observed that exempting inmates from the prohibition on bringing contraband into a custodial institution would "risk the introduction of drugs and other contraband into penal settings, and undermine the legislative aim to maintain order and safety therein." (*Low*, *supra*, 49 Cal.4th at p. 376.)

The Court of Appeal suggested that legalizing the possession of cannabis in custodial institutions would not necessarily frustrate the Legislature's prophylactic approach to contraband, because Proposition 64 does not prevent custodial officials from imposing administrative discipline. (*Raybon*, *supra*, 36 Cal.App.5th at p. 124; see Health & Saf. Code, § 11362.45, subd. (g) [allowing governmental agencies to "prohibit or restrict" cannabis in buildings that they own, lease, or occupy].) The opinion points in particular to state prison regulations classifying the "introduction, distribution, possession, or use of controlled substances" as being a "serious" rule violation. (*Raybon*, at p. 124; see Cal. Code Regs., tit. 15, § 3315(a)(1)(D).) Such a violation may result in, among other things, the loss of visitation privileges, the forfeiture of conduct credits, and placement in administrative segregation. (Cal. Code Regs., tit. 15, §§ 3176, 3315, 3323, 3335.) But reliance on such regulations is unavailing.

Administrative penalties are hardly a substitute for the deterrence effected by the threat of felony convictions and long sentences. In addition, the efficacy of administrative penalties is reduced in county jails and certain other custodial institutions. (Health & Saf. Code, § 11362.45, subd. (d); see Pen. Code, § 4573.) For example, the loss of conduct credits cannot extend

an inmate's incarceration beyond the maximum sentence imposed by the court. As an inmate approaches the maximum period of confinement, the deterrent effect of administrative discipline necessarily decreases. This may not pose much of a problem in state prisons, where an inmate's maximum term typically exceeds the amount of administrative discipline available. But the prospect of losing conduct credits and other privileges means significantly less to a county jail inmate serving a sentence measured in months or days. (See, e.g., Health & Saf. Code, § 11357, subd. (c)(2) [repeat possession of cannabis on school grounds punishable by not more than 10 days in county jail].)

A narrow construction of Health and Safety Code section 11362.45, subdivision (d) to apply only to actual "smoking or ingesting" cannabis "on the grounds of, or within, any facility or institution under the jurisdiction of the Department of Corrections" would also necessarily apply to facilities run by "the Division of Juvenile Justice [DJJ]." The legalization of cannabis-related activities in DJJ facilities would, however, put young people in juvenile custody at serious risk. The reading of the saving clause adopted by the Court of Appeal and advanced by appellants would facilitate the introduction of cannabis into custodial settings by persons 21 years of age or older. And the temptation posed by such introduction would be particularly troublesome in facilities that house juveniles and young adults under the age of 21, because they are not allowed to possess cannabis at all. (See Health & Saf. Code, § 11357, subd. (a).)

These results are inconsistent with Proposition 64's stated purpose to "protect children" (Prop. 64, § 2, para. A) and to enact "a regulatory structure that prevents access by minors" (*id.* at § 3, subd. (a)). To that end, the voters maintained misdemeanor sanctions, albeit in lesser amounts, for the possession of cannabis by a person 18 years of age or older "upon the grounds of, or within, any school providing instruction in kindergarten or

any of grades 1 through 12 during hours the school is open for classes or school-related programs." (Health & Saf. Code, § 11357, subd. (c), as amended by Prop. 64, § 8.1.) The voters also enacted a new provision making it misdemeanor for any person 18 years of age or older to "[p]ossess, smoke or ingest cannabis or cannabis products in or upon the grounds of a school, day care center, or youth center while children are present." (Health & Saf. Code, § 11362.3, subd. (a)(5), added by Prop. 64, § 4.6; see Health & Saf. Code, § 11362.4, subd. (c), added by Prop. 64, § 4.7.) A narrow reading of the saving clause would produce absurd results by making it a misdemeanor for an adult to possess 28.5 grams of cannabis on the grounds of a high school but no crime at all for that same adult to possess the same quantity of cannabis in a DJJ facility.

In contrast, construing the reference to laws "pertaining to smoking or ingesting cannabis" in DJJ facilities as including laws prohibiting anyone—particularly adults—from possessing cannabis in those facilities is consistent with the stated purpose of preventing minors from having access to cannabis. (See Prop. 64, § 3, subd. (a).) Indeed, DJJ facilities are intended to "provide comprehensive education, training, treatment, and rehabilitative services ... that are designed to promote community restoration, family ties, and victim restoration, and to produce youth who become law-abiding and productive members of society." (Welf. & Inst. Code, § 1710, subd. (b)(2).) Construing the savings clause as preserving Penal Code section 4573.6 and the other contraband statutes avoids putting children in DJJ facilities at risk by maintaining the longstanding, categorical prohibition on any person possessing any quantity of cannabis in any custodial institution without administrative authorization.

Only a broad interpretation of the savings clause that encompasses possession in the custodial context avoids these unreasonable consequences

that were not disclosed to, or intended by, those who voted in favor of Proposition 64.

C. The Voters Did Not Intend to Provide Inmates and Others Retroactive Relief from Penal Code Contraband Convictions

Appellants contend that they are entitled to the dismissal of their convictions for possessing contraband in violation of Penal Code 4573.6, all of which were imposed well before the passage of Proposition 64, on the theory that they would not have been guilty of an offense had Proposition 64 been in effect at the time. (See, e.g., Raybon CT 30, 33; Health & Saf. Code, § 11361.8.) Proposition 64 provides that a person currently serving a sentence "who would not have been guilty of an offense, or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that act been in effect at the time of the offense" may either petition for dismissal or request resentencing. (Health & Saf. Code, § 11361.8.)

For all the reasons discussed above, there is similarly no suggestion in the text or purpose of Proposition 64, or in the supporting ballot materials, that the initiative's dismissal and resentencing provisions affect the penalty expressly set out in the Penal Code sections addressing contraband in prisons, or the finality of convictions for violation of the same. (See Health & Saf. Code, § 11362.45 [saving clause]; see also, e.g., Penal Code, §§ 4573 [smuggling of controlled substances], 4573.5 [smuggling of alcohol or drugs], 4573.6 [possession of controlled substances], 4573.8 [possession of alcohol or drugs].) This lack of intent is further evidenced by the specific codes referenced in Health and Safety Code section 11361.8, subdivision (a): "resentencing or dismissal" is to be "in accordance with Sections 11357, 11358, 11359, 11360, 11362.1, 11362.2, 11362.3, and 11362.4 as those sections have been amended or added by that act."

Appellant inmates in this case were not, however, convicted of simply possessing cannabis in violation of Health and Safety Code section 11357, but rather of possessing cannabis *in prison* in violation of Penal Code section 4573.6. Accordingly, none "completed his or her sentence for a [possession] conviction under Section[ ] 11357 ...." (Health & Safety Code, § 11361.8, subd. (e).) The initiative does not afford retrospective resentencing, or relief from convictions, for inmates or others who have violated the State's prison contraband laws.

CONCLUSION

For the foregoing reasons, the order of the Court of Appeal directing the superior court to grant appellants' requests for retroactive relief from their convictions for violating Penal Code section 4573.6 should be reversed and the orders denying those requests should be affirmed.

Dated: December 5, 2019

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CERTIFICATE OF COMPLIANCE

I certify that the attached Opening Brief on the Merits uses a 13 point Times New Roman font and contains 11,789 words.

Dated: December 5, 2019

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Raybon**
Case No.: **S256978**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On December 5, 2019, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 5, 2019, at San Francisco, California.

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