In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

vs.

GOLDY RAYBON, DWAIN DAVIS, SCOTT WENDELL HAYNES, ANTHONY COOPER, JAMES POTTER,

Defendants and Appellants.

Case No. S256978

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

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

ANSWER BRIEF ON THE MERITS

STEVEN GARRETT
PUBLIC DEFENDER, COUNTY OF SACRAMENTO
700 H STREET, SUITE 0270, SACRAMENTO

* DAVID LYNCH
STATE BAR NO. 186048
ASSISTANT PUBLIC DEFENDER
lynchd@saccounty.net
(916) 874 6958

LEONARD K. TAUMAN
STATE BAR NO. 51685
taumanl@saccounty.net
ASSISTANT PUBLIC DEFENDER

Attorneys for Defendants and Appellants

* Counsel designated to receive notices under Rule 8.40(c)(2).

TABLE OF CONTENTS

TABLE OF CONTENTS 2
TABLE OF AUTHORITIES 4
ISSUE PRESENTED 8
INTRODUCTION 8
I. PROPOSITION 64 DECRIMINALIZED POSSESSION OF SMALL AMOUNTS OF MARIJUANA ON JAIL OR PRISON GROUNDS 10
A. THE PROPOSITION USED PLAIN LANGUAGE TO DECRIMINALIZE POSSESSION OF MARIJUANA, NOTWITHSTANDING ANY OTHER LAW 11
B. SECTION 11362.45(D) PLAINLY STATED THAT THE EXCEPTION FOR JAIL AND PRISON GROUNDS WAS FOR LAWS PERTAINING TO CONSUMPTION 13
1) POSSESSION IS A DISTINCT AND SEPARATE ACT FROM THE ACTS OF SMOKING AND INGESTING 15
2) RESPONDENT'S INTERPRETATION WRITES THE WORDS "SMOKING OR INGESTING" OUT OF THE STATUTE 16
3) IF THE SECTION WAS MEANT TO INCLUDE POSSESSION TOO, THERE IS NO REASON WHY THE DRAFTERS WOULD NOT HAVE SIMPLY SAID SO 20
II. EXTRINSIC EVIDENCE OF LEGISLATIVE PURPOSE AND VOTER INTENT CORROBORATES THE PLAIN MEANING OF THE STATUTE 21
A. THE STATED PURPOSE OF THE LAW WAS TO DECRIMINALIZE POSSESSION OF MARIJUANA IN ALL BUT LIMITED CIRCUMSTANCES 22
B. THERE WAS NO AMBIGUITY IN WHAT THE VOTERS WERE TOLD 25

III. PROPOSITION 64 DECRIMINALIZED MARIJUANA POSSESSION UNDER DIVISION 10 OF THE HEALTH AND SAFETY CODE, WHICH REMOVED MARIJUANA FROM THE REACH OF PENAL CODE SECTION 4573.6 28

IV. RESPONDENT'S POLICY JUSTIFICATIONS FOR INCARCERATING PEOPLE WHO POSSESS MARIJUANA ON JAIL OR PRISON GROUNDS PROVIDE INSUFFICIENT BASIS TO IGNORE THE PLAIN MEANING OF THE STATUTES OR TO REJECT AN OUTCOME APPROVED BY THE VOTERS 31

A. THE POLICIES REGARDING CRIMINAL PENALTIES FOR NON-VIOLENT CRIMES ARE CHANGING 31

B. POLICY DISAGREEMENTS DO NOT SUPPORT AN INTERPRETATION INCONSISTENT WITH A STATUTE'S PLAIN MEANING, PURPOSE, AND VOTER INTENT 33

C. CREATING AN UNSTATED EXCEPTION TO THE STATUTE TO ALLOW FELONY PROSECUTION FOR POSSESSION OF MARIJUANA IS UNREASONABLE AND UNNECESSARY 36

CONCLUSION 44

BRIEF FORMAT CERTIFICATION 45

DECLARATION OF SERVICE 46

TABLE OF AUTHORITIES

Cases — Pages

Caliber Bodyworks, Inc. v. Superior Court
(2005) 134 Cal.App.4th 365 12

In re Greg F.
(2012) 55 Cal.4th 393 12

In re Lance W.
(1985) 37 Cal.3d 873 ..... 10, 21, 30

Lungren v. Deukmejian
(1988) 45 Cal.3d 727 25

In re Marriage of Cutler
(2000) 79 Cal.App.4th 460 12

Mendoza v. Nordstrom, Inc.
(2017) 2 Cal.5th 1074 17

People v. Fenton
(1993) 20 Cal.App.4th 965 ..... 29, 30, 37, 39

People v. Gutierrez (in Re Gutierrez)
(1997) 52 Cal.App.4th 380 ..... 17, 40

People v. Harris
(1989) 47 Cal.3d 1047 27

People v. Harris
(2006) 145 Cal.App.4th 1456 ..... *passim*

People v. Low
(2010) 49 Cal.4th 372 ..... 15, 29

People v. Perry,
(2019) 32 Cal.App.5th 885 ..... *passim*

People v. Raybon
(2019) 36 Cal.App.5th 111 ..... 10, 37, 43

People v. Rodriguez
(2012) 55 Cal.4th 1125 17

People v. Romanowski
(2017) 2 Cal.5th 903 ..... 12, 13

People v. Superior Court (Pearson)
(2010) 48 Cal.4th 564 11

People v. Tillman
(1999) 73 Cal.App.4th 771 12

People v. Valencia
(2017) 3 Cal.5th 347 ..... *passim*

People v. Weidert
(1985) 39 Cal.3d 836 ..... 11, 42

In re Rojas
(1979) 23 Cal.3d 152 21

People ex rel. San Francisco Bay Conservation & Development Com. v. Emeryville
(1968) 69 Cal.2d 533 ..... 14, 22

StorMedia Inc. v. Superior Court
(1999) 20 Cal.4th 449 21

Williams v. County of San Joaquin
(1990) 225 Cal.App.3d 1326 ..... 17, 30, 42

Statutes

Business and Professions Code section 26067(a) 18

Health and Safety Code section 11018 13

Health and Safety Code section 11357 ..... 28, 30, 31

Health and Safety Code section 11357(b) 31, 32

Health and Safety Code section 11357(c) 26

Health and Safety Code section 11358 44

Health and Safety Code section 11359 44

Health and Safety Code section 11360 44

Health and Safety Code section 11362.1 ..... *passim*

Health and Safety Code section 11362.2 ..... 11, 13, 44

Health and Safety Code section 11362.3 16

Health and Safety Code section 11362.3(a)(1), (a)(7), and (a)(8) 16

Health and Safety Code section 11362.3(a)(2) and (a)(3) 16

Health and Safety Code section 11362.3(a)(4) 16

Health and Safety Code section 11362.3(a)(5) 16

Health and Safety Code section 11362.4 ..... 11, 13, 44

Health and Safety Code section 11362.45 ..... 11, 13, 14

Health and Safety Code section 11362.45(d) ..... *passim*

Health and Safety Code section 11362.45(g) *38*

Health and Safety Code section 11362.5(d) 32

Health and Safety Code section 11370.2 32

Penal Code section 667.5 32

Penal Code section 1385(b) 30

Penal Code Section 4573 ..... 13, 18

Penal Code sections 4573 through 4573.9 20

Penal Code section 4573.6 ..... *passim*

Penal Code section 4573.8 30

Proposition 36 32

Proposition 47 ..... *passim*

Proposition 57 32

Proposition 64 ..... *passim*

Proposition 64, section 2, subdivision A 26

Proposition 64, section 2, subdivision G 23, 35, 41, 42

Proposition 64, section 3 ..... 23, 24, 35, 36

Proposition 64, section 3, subdivision (r) 17, 20

Proposition 64, section 3, subdivision (l).....26

Proposition 64, section 3, subdivision (w)..... 23, 35

Proposition 64, section 10.....24

Proposition 215 215

Three Strikes Reform Act.....33

Other Authorities

15 C.C.R section 3016 15

15 C.C.R. sections 3176, 3315, 3323, and 3335.....38

15 C.C.R. section 3176, subdivision (c) 38

15 C.C.R. section 3315, subdivision (f).....38

15 C.C.R. section 3323, subdivisions (c)(6) and (d)(7) 38

15 C.C.R. section 3335 38

Cal. Const., Art. II, section 10(c).....19

C.D.C.R.'s Department Operating Manual section 52080.5.....38

Intravenous Marijuana Syndrome, Western Journal of Medicine.....18

Official Voter Information Guide ..... passim

Safe Cannabis Guide 18

Statement of Vote, November 8, 2016 General Election 22

Stats 2017, ch 27, sections 113-160.....32

ISSUE PRESENTED

Did Proposition 64 voters decriminalize simple possession of a small amount of marijuana by adults on jail or prison grounds?

INTRODUCTION

On November 8, 2016, California voters were asked whether to enact a "MARIJUANA LEGALIZATION INITIATIVE STATUTE." It was sweeping legislation and its direction was unmistakable – to remove almost all criminal penalties for possession of small amounts of marijuana. The electorate said "yes" by a clear majority. In doing so, voters delivered a message that it was time to legalize marijuana and to end harsh sentences for mere possession of small amounts.

When Proposition 64 decriminalized possession and use of small amounts of marijuana by adults, it did so "notwithstanding any other provision of law," with limited articulated exceptions. (Health and Safety Code section 11362.1.) Pertinent here, the electorate permitted an exception to decriminalization: "Laws pertaining to smoking or ingesting marijuana" on jail or prison grounds. (Health and Safety Code section 11362.45(d).) A plain reading is that this exception is limited to laws relating to the acts of "smoking" or "ingesting" the substance.

Respondent advocates for a different interpretation of the exception. Respondent asserts that "laws pertaining to smoking or ingesting marijuana"

is so broad that it is another way of saying "laws pertaining to marijuana." This is wrong at first blush and wrong under scrutiny. This argument collapses under the weight of a single question: If voters meant "laws pertaining to marijuana" on jail or prison grounds, why not simply say so?

Put another way, the terms "smoking or ingesting" were included in the text for a reason. Words matter. The logical interpretation is that the words "smoking or ingesting" had purpose – to make the exception specific to those kind of acts.

Respondent advocates for an alternate interpretation to create ambiguity where there is none. When a statute's meaning is plain, there is no need for further consideration. However, even if one looks further, the Voter Guide is bereft of any support for Respondent's interpretation and rich in support of the statute's plain meaning.

First, any interpretation should comport with the overall purpose of the initiative, with exceptions narrowly construed. The purpose of Proposition 64 was to remove criminal sanctions for possession of small amounts of marijuana. The Court of Appeal ruling is consistent with that.

Second, any interpretation should not contradict voter expectations. Voters were told of the breadth of the changes and were directed to the few exceptions contained in the sweeping decriminalization. Voters endorsed

this concept. To overrule the Court of Appeal would frustrate that understanding.

Respondent asks this Court to maintain the Appellants' lengthy prison sentences for possession of marijuana, even though the voters supported the law's stated purpose and effect of comprehensive decriminalization. As the Court of Appeal observed below, the Attorney General's argument is nothing more than a policy disagreement. (*People v. Raybon* (2019) 36 Cal.App.5th 111, 124 ["The four ways the Attorney General suggests the purpose of Penal Code section 4573.6 would be undercut are all variations of the policy debate"].)

In sum, in defiance of rules of interpretation and contrary to the voters' intent, Respondent's interpretation flips the exception from limited to expansive. This ignores the statute's plain meaning, is contrary to common usage, reads critical language entirely out of the statute, and is antithetical to its purpose and context.

I.

THE PLAIN MEANING OF THE STATUTE IS THAT PROPOSITION 64 DECRIMINALIZED POSSESSION OF SMALL AMOUNTS OF MARIJUANA ON JAIL OR PRISON GROUNDS

When statutory language is clear, courts "must follow the language used and give to it its plain meaning, whatever may be thought of the wisdom,

expediency, or policy of the act ..." (*People v. Weidert* (1985) 39 Cal.3d 836, 843.)

> [I]f there is no ambiguity in the language of the statute, then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs. Where the statute is clear, courts will not interpret away clear language in favor of an ambiguity that does not exist.

(*People v. Harris* (2006) 145 Cal.App.4th 1456, 1458.) When the language is unambiguous, courts "may not add to the statute or rewrite it to conform to some assumed intent not apparent from the language." (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.) The language of the laws enacted by Proposition 64 is not ambiguous.

A. The Proposition Used Plain Language to Decriminalize Possession and Use of Marijuana, Notwithstanding Any Other Law

Proposition 64 used the strongest and broadest of language in decriminalizing marijuana possession.

> Subject to Sections 11362.2, 11362.3, 11362.4, and 11362.45, but ***notwithstanding any other provision of law, it shall be lawful under state and local law, and shall not be a violation of state or local law***, for persons 21 years of age or older to: (1) Possess, 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 ...

(Health & Safety Code[1] section 11362.1(a) (emphasis added).) Under well-established California law, the use of the phrase "notwithstanding any other

---

[1] Hereafter, all statutory references will be to the Health and Safety Code unless otherwise stated.

provision of law" repeals other laws that are in conflict with it. "When the Legislature intends for a statute to prevail over all contrary law, it typically signals this intent by using phrases like 'notwithstanding any other law' or 'notwithstanding other provisions of law.'" (*In re Greg F.* (2012) 55 Cal.4th 393, 406 [citations omitted].) "The statutory phrase 'notwithstanding any other law' has been called a 'term of art' [citation] that declares the legislative intent to override all contrary law." (*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 383, fn. 17, citing, *inter alia*, *In re Marriage of Cutler* (2000) 79 Cal.App.4th 460, 475 ["'notwithstanding any other provision of law" signals a broad application overriding all other code sections"] and *People v. Tillman* (1999) 73 Cal.App.4th 771, 783-785 [interpreting statute broadly to eliminate existing laws because of this language].)

This Court underscored the sweep of such language in *People v. Romanowski*, explaining its meaning within Proposition 47:

> Nothing in the text of the initiative suggested that the voters were implicitly leaving this form of theft out when they used the phrases "any other provision of law defining grand theft" and "obtaining any property by theft." (§ 490.2, subd. (a).) We deny a phrase like "any other provision of law" its proper impact if we expect a penal statute—whether enacted by the Legislature or the electorate—to further enumerate every provision of the Penal Code to which it is relevant. And we generally presume that the electorate is aware of existing laws. (*In re Lance W.* (1985) 37 Cal.3d 873, 890 & fn. 10 [210 Cal. Rptr. 63 1, 694 P.2d 744].) Here this means we must presume that voters were at least aware that the Penal Code sets out

> "grand theft" crimes that included theft of access card account information. (§ 484e.)

(*People v. Romanowski* (2017) 2 Cal.5th 903, 908-909 (emphasis added).)

Proposition 64's "notwithstanding any other provision of law" provides the "'formally expressed intent' to change the established status quo" that Respondent seeks. (Resp. Op. Br., at pp. 10 and 30.)

B. Section 11362.45(d) Plainly Stated That The Exception For Jail And Prison Grounds Was For Laws Pertaining To Consumption

Section 11362.1(a) comprehensively decriminalizes possession and use of marijuana, with limited exceptions, which are explicitly articulated in Sections 11362.2, 11362.3, 11362.4, and 11362.45. One of those exceptions speaks to marijuana[2] on jail or prison grounds.

> Nothing in section 11362.1 shall be construed or interpreted to amend, repeal, affect, restrict, or preempt:
>
> ...
>
> (d) Laws pertaining to smoking or ingesting marijuana or marijuana 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.

---

[2] The term "marijuana" will be used throughout this brief because that was the term used in the initiative measure. However, the Legislature subsequently substituted the term "cannabis" for "marijuana" throughout the Health and Safety Code. (Stats. 2017, ch 27, sections 113-160.) Both terms mean "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." (Section 11018 (both former and amended versions).

(Section 11362.1(a).) A plain reading of this exception is that laws relating to smoking or ingesting, however written and regardless of the terms used to describe those acts, would not be repealed or preempted.

Respondent asserts that the words "pertaining to" is a catch-all term, and thus "smoking and ingesting" are mere proxies for possession, and all things marijuana. (Op. Br., at p. 29 and pp. 36-40.) However:

> It is a wise and well-settled principle of statutory construction that "where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof."

(*People ex rel. San Francisco Bay Conservation & Development Com. v. Emeryville* (1968) 69 Cal.2d 533 (citations omitted).)

Appellants agree that "pertaining to" is relative. (See Resp. Op. Br., at p. 36 [definitions feature the concepts of "relat[ing] directly to" or "belong[ing] as an attribute, feature, or function" or "belong[ing] or be connected as a part, adjunct, possession, or attribute"]; *People v. Perry*, (2019) 32 Cal.App.5th 885, 891.) One must then ask, "What is it that the 'laws' in Section 11362.45 must directly relate to, or belong as a feature of?" The answer is provided by the words that immediately follow: "smoking or ingesting marijuana." Simply put, the "laws" that Section 11362.45 exempts from repeal must directly relate to smoking or ingesting marijuana.

The rules of statutory construction require us to "give [these words] 'a plain and commonsense meaning.'" (*People v. Harris*, *supra*, 145 Cal.App.4th, at 1465; see e.g., *People v. Low* (2010) 49 Cal.4th 372 [applying commonsense meaning to the terms "Any Person," "Brings," and "Knowingly" in Penal Code section 4573].) Yet Respondent presses this court to accept an unreasonably broad reading that does violence to the ordinary and common understanding of the term as employed in the statute. Respondent argues that the direct relation reference is "quite broad" and "it is reasonable to assume" encompassed the act of possession too. (Resp. Op. Br., at pp. 36-37.) This conjecture is unreasonable for three reasons.

1) Possession is a distinct and separate act from the acts of smoking and ingesting

It is true that there are few purposes for possessing a drug other than for some person to eventually use it. (Resp. Op. Br., at p. 37.) But, as Respondent conceded in the Court of Appeal, smoke, ingest, and possess are "distinct" terms and "each represents different conduct." (C.O.A. Resp. Br., at p.33; see also 15 C.C.R. section 3016 [stating inmates shall not "use, inhale, ingest, inject, or otherwise introduce [drugs] into their body" in subdivision (a) and separately forbidding inmates to "possess, manufacture, or have under their control any [drug]" in subdivision (b)].)

Different acts call for different responses. For this reason, the three different terms – possess, smoke, and ingest – are used with exactitude

throughout Proposition 64. For example, under the terms of Section 11362.3, separate exemptions from decriminalization apply to these separate acts. Subdivisions (a)(l), (a)(7), and (a)(8) exempt smoking or ingesting marijuana in specified places, whereas Subdivisions (a)(2) and (a)(3) exempt just the act of smoking marijuana and in different specified places. Subdivision (a)(4) exempts the possession of marijuana under certain circumstances. And Subdivision (a)(5) lists all three: possession, smoking, and ingesting. The three terms refer to separate and distinct acts and Proposition 64 addressed each with precision. The drafters knew how to reference possession when they wanted to – they used the term possession! It stretches the imagination to conclude that the drafters listed the two distinct activities of "smoking or ingesting," intending to include a third distinct activity, possession, by tangential reference. A voter would view possession outside the purview of Section 11362.45(d) because the distinct acts of "smoking or ingesting" are explicitly flagged but possession is not. The straight-forward, plain reading of the exemption is that it references only acts involving *consumption* of marijuana in prison.

2) Respondent's interpretation writes the words "smoking or ingesting" out of the statute

If "pertaining to smoking or ingesting marijuana" includes possession too, then Section 11362.45(d) applies to laws "pertaining to marijuana." Using such an expansive view writes the limiting words – the acts which the

laws must pertain to – out of the statute completely. "[T]he Legislature does not engage in idle acts, and no part of its enactments should be rendered surplusage if a construction is available that avoids doing so." (*Mendoza v. Nordstrom, Inc.* (2017) 2 Cal.5th 1074, 1087.) "We give significance to every word in the statute actually enacted to implement the legislative purpose and avoid a construction that makes some words surplusage." (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1133.)

To illustrate, the drafters wanted to "[a]llow public and private employers to enact and enforce policies pertaining *to marijuana*." (Prop 64., Section 3, subdivision (r) (emphasis added).) The fact that the drafters used "pertaining *to smoking or ingesting marijuana*" in Section 11362.45(d) proves a different intention (emphasis added).

> Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed.

(*Williams v. County of San Joaquin* (1990) 225 Cal.App.3d 1326, 1332.) "Smoking and ingesting" describes more targeted, less expansive conduct: consumption, "the ultimate evil with which [society is] concerned." (*People v. Gutierrez (in Re Gutierrez)* (1997) 52 Cal.App.4th 380, 386.) As another example, the drafters used the restrictive word "cultivation" following "pertains to" when amending the Business and Professions Code. There, they authorized the Secretary of the Department of Food and Agriculture to

"administer this section as it pertains *to the cultivation of* marijuana" not "as it pertains *to marijuana*." (Business and Professions Code section 26067(a) (emphasis added).)

Respondent suggests the drafters would have used the phrase "[l]aws *prohibiting* smoking or ingesting marijuana" if they had wanted to exclude possession. (Resp. Op. Br., at p. 37 (emphasis added).) But such an exception would be inadequate if strictly limited to prohibitions on smoking or ingesting. For jails and prisons especially, it is the consumption of marijuana that is the core concern and consumption can be achieved by methods which do not strictly involve smoking or ingesting. The Legislative Analyst laid out the various means of consumption for the voters in a special section, "How do Individuals Use Marijuana?" (Official Voter Information Guide, General Election (November 8, 2016) ["Voter Guide"], p. 91.) Marijuana can be inhaled as a non-burning vapor or applied topically such that it is absorbed through the skin. (*Id.*; *Safe Cannabis Guide,* found at https://www.safecannabisuse.com/dosing/). Creative users may even attempt injecting it. (*Intravenous marijuana syndrome,* Western Journal of Medicine (July 1986), Vol. 145(1), pp. 94-96.) The Voter Guide's list of methods is neither exhaustive nor stagnant; new methods of use can arise over time. Regardless, it would not be practical to cram even this incomplete list into the statute. Instead, rather than attempting to encapsulate all possible

methods of use, current or future, the conduct was described by the phrase "pertaining to smoking and ingesting marijuana." (Section 11362.45(d).) It makes sense that this phrase was referencing these other methods of consumption. It makes no sense that it was including a different act, simple possession, within its ambit.

Section 11362.45(d) is also a forward-looking statute. Proposition 64's laws, enacted by voter initiative, may be amended or repealed by the Legislature only with the approval of the electorate, unless the initiative statute provides otherwise. (Cal. Const., Art. II, section 10(c); see Prop. 64, Section 10 ["Except as otherwise provided, the provisions of the act may be amended by a two-thirds vote of the Legislature *to further the purposes and intent of the act.*"] (emphasis added).) This statute allows the legislature to make laws proscribing smoking or ingesting (or other forms of consuming) marijuana on jail or prison grounds, should legislators consider them appropriate. In the absence of section 11362.45(d), such laws would not otherwise further the purposes and intent of the act. The terms "restrict" and "preempt" in Section 11361.45 serve the purpose of allowing the Legislature to enact laws regulating smoking or ingesting marijuana on the grounds of a jail or prison.

3) If the section was meant to include possession too, there is no reason why the drafters would not have simply said so

Had the drafters intended an exception for possession on prison grounds, they would have just said so. The drafters of Proposition 64 did use the more general clause, "pertaining to marijuana," elsewhere. (Prop. 64, Section 3, subdivision (r).) The term was used to explain that the law's "Purpose and Intent" would, "Allow public and private employers to enact and enforce policies pertaining to marijuana." Had the drafters intended a similarly broad meaning for Section 11362.45(d), they would have used that same language. They did not.

There are other ways the drafters could easily have maintained criminal sanctions for simple possession on jail or prison grounds. They could have explicitly listed "possession" alongside "smoking or ingesting" in Section 11362.45(d), as they did elsewhere. (See e.g. Section 11362.3, subdivision (a)(5).) Alternately, given that Section 11362.45(d) references Penal Code section 4573 directly, they could have simply said, "Section 11362.1 does not affect Penal Code sections 4573 through 4573.9." Any of these methods would have been a straightforward and obvious way to achieve what Respondent asserts they intended. The drafters used none of them. Respondent has not, and simply cannot, explain the absence of an express reference to possession.

> To add the qualification proposed by the People would require that we step beyond our judicial function and rewrite the statute, which we cannot do. "In the construction of a statute ... the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted[.]" (Code Civ. Proc., § 1858.) "***We are not authorized to insert qualifying provisions not included, and may not rewrite the statute to conform to an assumed intention which does not appear from its language.***"

(*People v. Harris supra*, 145 Cal.App.4th, at 1465-1466 (some citations omitted)(emphasis added).) Respondent would have this Court add the word "possession" where it is conspicuous by its absence. Rather than effectuate voter expectations, it would thwart them.

II.

EXTRINSIC EVIDENCE OF LEGISLATIVE PURPOSE AND VOTER INTENT CORROBORATES THE PLAIN MEANING OF THE STATUTE

When a statute's plain meaning is unambiguous, as here, then that is the end of the matter. "In engaging in statutory interpretation we are to accord words their usual, ordinary, and common sense meaning based on the language the Legislature used and the evident purpose for which the statute was adopted." (*In re Rojas* (1979) 23 Cal.3d 152, 155.) If the language is clear and unambiguous there is no need for construction. (*In re Lance W.* (1985) 37 Cal.3d 873, 886; *StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 449, 459-460 ["Consideration of extrinsic aids to statutory construction is proper only if a statute is ambiguous"].)

California voters passed Proposition 64 on November 8, 2016, by an approximate two million majority.[3] Respondent suggests those voters did not know what they were getting or were too naïve to realize the import of what they were enacting. To the contrary, Proposition 64 presented its broad decriminalization package squarely to the voters. Voters were told that people would be released from prison. (Voter Guide, at p. 95.) This court should not interpret the law to avoid decriminalization when that is what they voted for.

A. The Stated Purpose Of The Law Was To Decriminalize Possession Of Marijuana In All But Limited Circumstances

When looking at extrinsic evidence for meaning, the goal is to harmonize the text with the statute's overall goals.

> The objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in [the word's] interpretation, and where a word of common usage has more than one meaning, the one which will best attain the purposes of the statute should be adopted.

(*People ex rel. San Francisco Bay Conservation & Development Com. v. Emeryville*, *supra*, 69 Cal.2d, at 543-544; see also *People v. Valencia* (2017) 3 Cal.5th 347, 357-358 [text should be "construed in context, keeping in mind the statutory purpose"].)

---

[3] Proposition 64 was passed by 57.1% of the vote, with 7,979,041 votes versus 5,987,020 against the initiative. (STATEMENT OF VOTE, NOVEMBER 8, 2016 GENERAL ELECTION, certified by the California Secretary of State, found at https://elections.cdn.sos.ca.gov/sov/2016-general/sov/2016-complete-sov.pdf, p. 12.)

The purposes behind Proposition 64 were stated by the drafters and known to the voters. Proposition 64 stated its "Purpose and Intent," which was "to establish a comprehensive system to legalize, control and regulate" marijuana. (Prop. 64, Section 3.) Respondent propounds that the initiative's core purpose was regulation of the production and sale of marijuana. (Resp. Op. Br. at p. 11). The Attorney General thought otherwise, entitling Proposition 64 the "MARIJUANA LEGALIZATION. INITIATIVE STATUTE," a title which appears at the top of every page of discussion and debate concerning the workings, scope, and consequences of the initiative. (Voter Guide at pp. 90-99.) The Attorney General (Voter Guide at p. 90) and the Legislative Analyst (Voter Guide at p. 92) emphatically alerted voters that the crux of Proposition 64 was legalization. This aligns with the initiative's legislative purpose and with voter intent:

> Currently, the courts are clogged with cases of nonviolent drug offenses. By legalizing marijuana, the Adult Use of Marijuana Act will alleviate pressure on the courts, but continue to allow prosecutors to charge the most serious marijuana-related offenses as felonies, while reducing the penalties for minor marijuana-related offenses as set forth in the act.

(Prop. 64, Section 2, subdivision G.) The Proposition's "Purpose and Intent" was, *inter alia*, to "[p]reserve scarce law enforcement resources to prevent and prosecute violent crime." (Prop. 64, Section 3, subdivision (w).) The Legislative Analyst projected reduced criminal justice costs, primarily

related to a decline in the number of offenders held in state prisons and county jails. (Voter Guide, at p. 96.)

In varying degrees, the Proposition reduced or eradicated penalties, in substantial degree. Eliminating consecutive six-year prison sentences[4] for simple possession falls directly within that paradigm. (See *People v. Harris*, *supra*, 145 Cal.App.4th, at 1466 [finding that "it is conceivable that the Legislature has declined to criminalize [bringing certain drugs into jails] so as not to unnecessarily subject their possessors to criminal sanctions" and noting a similar reluctance to impose criminal prosecution or sanctions on those possessing medical marijuana].) "This act shall be broadly construed to accomplish its purposes and intent as stated in Section 3." (Prop. 64, Section 10.)

Respondent's interpretation not only does injury to the common sense reading of "pertaining to smoking and ingesting," it would disrupt the statutory scheme. The initiative successfully sought to break from the severe criminal sanctions prevalent before passage of Proposition 64.

> "[T]he 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and

[4] This, for example, was the sentence imposed upon appellant Anthony Cooper. (Appellate Record, *People v. Cooper*, C08491, at p. 21.)

> provisions relating to the same subject matter must be harmonized to the extent possible.

(*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) In sum, the electorate reached the reasonable conclusion that a person's simple possession of a small amount of marijuana, even on jail or prison grounds, does not merit conviction, incarceration, its attendant collateral consequences to the accused, and the massive costs to the state. The plain meaning of Section 11362.45(d) is consistent with the intent of the voters.

B. There Was No Ambiguity In What The Voters Were Told

The voters were not blindsided by decriminalization of possession on jail or prison grounds. They were provided a clear and succinct outline of the initiative's wholesale decriminalization. They were told the goals included abolishing prison sentences for acts involving marijuana.

It is true that jails and prisons were not mentioned in the Legislative Analyst's comments. But the Voter Guide neither understated nor misadvised on the breadth of the decriminalization. The Attorney General used bold caps to alert voters that Proposition 64 was a "MARIJUANA LEGALIZATION. INITIATIVE STATUTE." (Voter Guide, at p. 90.) Directly under that heading, in the "Summary," the Attorney General's first bullet point was that the proposition "Legalizes marijuana under state law, for use by adults 21 or older." (*Ibid.*) Thereafter, in its opening sentence under the heading "PROPOSAL," the Legislative Analyst informed voters

that "This measure (1) legalizes adult nonmedical use of marijuana ..." (*Id.* at p. 92). Under a subheading, "Legalization of Adult Nonmedical Use of Marijuana," the Voter Guide further elucidated, "This measure changes state law to legalize the use of marijuana for nonmedical purposes by adults age 21 and over." (*Ibid.*) And the text of the law announced it "will legalize marijuana for those over 21 years old ..." (Prop. 64, Section 2, subdivision A.) From title to tail, the ballot guide heralded the encompassing sweep of the proposition's provisions.

The initiative also indicated there would be limitations to this across-the-board decriminalization. (Prop. 64, Section 3, subdivision (l) [it "[p]ermit[s] adults 21 years and older to use, possess, purchase, and grow [marijuana] *within defined limits* ..."] (emphasis added).) The Legislative Analyst's summary likewise indicated there would be exceptions, "summarize[ing] what activities would be allowable under the measure" and presenting a chart in that same fashion. (Voter Guide, at p. 92, Figure 2.) The chart listed "Activities Allowed Under the Measure" and "Activities Not Allowed Under the Measure." (*Ibid.*) Pertaining to possession, it stated possession of small amounts were "Allowed" and listed only possession on the grounds of schools, day care centers, or youth centers as "Not allowed."[5]

[5] Even those exemptions carry minimal penalties. For example, possession of marijuana on the grounds of a school, day care center, or youth center is subject to a $250 fine for a first offense or a 10-day misdemeanor for a second offense. (Section 11357(c).)

(*Ibid.*) The concept is simple – possession is lawful across the board, except as listed.[6] It demeans the voters to presume the concept eluded them. (Resp. Op. Br., at p. 41 ["it was 'almost certainly opaque to the average voter ...'"].)

Without supporting evidence, Respondent postulates that both the Attorney General and Legislative Analyst failed to grasp the concept too. (Resp. Op. Br., at p. 40-41.) It is understandable that the Legislative Analyst would not detail each and every place that possession of marijuana was decriminalized. Both the Attorney General and Legislative Analyst proclaimed repeatedly that the initiative legalized marijuana under state law. (Voter Guide, at pp. 90 and 92.) The absence of reference to prisons is not meaningful.

For those voters curious to know about such details, they only had to look to the text of the statute. Voters do not necessarily know the Latin maxim, *expressio unius est exclusion alterius,* or that it means, "where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed." (*People v. Harris* (1989) 47 Cal.3d 1047, 1082 (citation omitted); *People v. Perry*, *supra*, 32 Cal.App.5th, at 896 and 896 fn.10 [citing *expressio unius est exclusion alterius* and referring to "the absence of a specific reference to possession" in Section 11362.45(d)].) Yet

[6] If anything then, the all-encompassing language of the Voter Guide suggested that all activity on jail or prison grounds – possession *and* smoking and ingesting – would be decriminalized.

this concept lives not just in complex or archaic legal philosophy but in common sense. The statute lists two actions – what voter would think "pertaining to" expanded it to three?

In all, the implication that voters would not have voted for the initiative had they known it would decriminalize possession on jail or prison grounds lacks any evidentiary foundation and is mere speculation in support of a policy argument. To the contrary, consistent with its purpose, the Voter Guide told voters the initiative would almost universally decriminalize marijuana possession and would result in resentencing for those previously convicted.

III.

PROPOSITION 64 DECRIMINALIZED MARIJUANA POSSESSION UNDER DIVISION 10 OF THE HEALTH AND SAFETY CODE, WHICH REMOVED MARIJUANA FROM THE REACH OF PENAL CODE SECTION 4573.6

By its terms, Penal Code section 4573.6 applies only to "controlled substances, *the possession of which is prohibited by Division 10* (commencing with section 11000) of the Health and Safety Code." (Emphasis added.) Previously Division 10, at Section 11357, criminalized possession of less than an ounce of marijuana. Following passage of Proposition 64, possession of small quantities of marijuana is no longer prohibited by Section 11357 of Division 10. Penal Code section 4573.6,

which is dependent on a prohibition in Division 10, no longer prohibits possession of less than an ounce of marijuana.

This interpretation aligns with the analysis in *People v. Fenton* (1993) 20 Cal.App.4th 965. There, the issue was whether Penal Code section 4573.6 applied to an opiate, hydrocodone, for which the jail inmate had a valid prescription. The *Fenton* court explained that this lawfully possessed drug was not prohibited by Penal Code section 4573.6.

> Contrary to the Attorney General's assertion, the reference to division 10 must include the prescription exception because ***section 4573 imports the prohibition against possession of controlled substances not the list of controlled substances.*** Thus, the "plain meaning" of the statute is that one may bring controlled substances into a penal institution if an exception contained in division 10 applies. Here, one does. Health and Safety Code section 11350 does not prohibit possession of a controlled substance with a prescription.

(*Id.*, at 969 [emphasis added]; *People v. Harris*, *supra*, 145 Cal.App.4th, at 1467.)[7] Division 10 now allows possession of small amounts of marijuana so it follows that Penal Code section 4573.6 no longer punishes it.

The *Perry* court recognized this.

> The complication, of course, arises from the fact that Penal Code sections 4573, 4573.6 and 4573.9 continue to define the in-custody offense by reference to "any controlled substance, the possession of which is prohibited by Division 10" after Proposition 64 eliminated the prohibition against possession of cannabis by adults in many situations (§§ 4573, 4573.9; see §

[7] The court in *People v. Perry*, *supra*, 32 Cal.App.5th,at 893 had "no reason to disagree with the analysis in *Fenton*." (See also *People v. Low* (2010) 49 Cal.4th 372, 383 [citing *Fenton* with approval].)

> 4573.6). As a result, the 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.

(*People v. Perry*, *supra*, 32 Cal.App.5th, at 896, fn. 10.) The *Perry* court, however, concluded that Proposition 64 was not intended to affect the legal status of marijuana in prison and thus the literal reading, the one adroitly explained by *Fenton*, simply could not be. (*Ibid.* [it "would lead to the absurd result of Proposition 64 leaving intact proscriptions against using cannabis in prison but invalidating proscriptions against *possessing* it"] (emphasis in original).)

Respondent notes that the statutes "do not fit together perfectly" and suggests an alternate basis for a conviction, Penal Code section 4573.8. (Resp. Op. Br. at p.32.) But none of the appellants were charged and convicted of a violation of Penal Code section 4573.8. When statutory language is clear and unambiguous, there is no need for construction. (*In re Lance W.*, *supra*, 37 Cal.3d, at 886.) Also, courts should assume that the purpose of a new enactment is to change existing law. (*Id.*, at 887 (citations omitted).) This is because "[b]oth the Legislature and the electorate by the initiative process are deemed to be aware of laws in effect at the time they enact new laws and are conclusively presumed to have enacted the new laws in light of existing laws having direct bearing upon them." (*Williams v. County of San Joaquin*, *supra*, 225 Cal.App.3d, at 1332 (citations omitted).)

Applying these principles, Proposition 64's amendments to Division 10 were intended to remove decriminalized marijuana possession from the reach of Penal Code section 4573.6. This conclusion is independently sound and is supported by the plain language of Sections 11362.1 and 11362.45(d).

IV.

RESPONDENT'S POLICY JUSTIFICATIONS FOR INCARCERATING PEOPLE WHO POSSESS MARIJUANA ON JAIL OR PRISON GROUNDS PROVIDE INSUFFICIENT BASIS TO IGNORE THE PLAIN MEANING OF THE STATUTES OR TO REJECT AN OUTCOME APPROVED BY THE VOTERS

A. The Policies Regarding Criminal Penalties For Non-Violent Crimes Are Changing

Respondent speaks of the longstanding, comprehensive, and prophylactic scheme of which Penal Code section 4573.6 is a part, but acknowledges that the voters have the power to alter it. (Resp. Op. Br., at p. 9.) And Respondent further acknowledges how views about marijuana have evolved over the decades. (*Id.*, at p. 16-17.) In 1975, the Legislature first decreased the punishment for possession of marijuana, reducing it from a wobbler to a misdemeanor. (Former section 11357, as amended by Stats. 1975, ch. 248, section 2, pp. 641-642.) For small amounts, under 28.5 grams, the crime was thereafter only punishable by a $100 fine. (Former section 11357(b).) The trend of reducing punishment for marijuana possession has continued since that time. In 1996, the voters passed Proposition 215, the

Compassionate Use Act, which completely decriminalized marijuana possession if the person had a physician's oral or written recommendation. (Section 11362.5(d).) In 2010, the Legislature reclassified possession of under 28.5 grams of marijuana as an infraction. (Former Section 11357(b), as amended by Stats. 2010, ch. 708, section 1.) Nearly universal decriminalization of marijuana possession under Proposition 64 is simply the natural extension of this trend.

This evolving attitude to marijuana has coincided with changing views about the societal costs of incarceration. The past decade saw California citizens pass Proposition 36 in 2012 (removing three-strikes life sentences for those committing non-violent felonies), Proposition 47 in 2014 (reducing non-violent theft and drug offenses to misdemeanors), and Proposition 57 in 2016 (reducing prison terms for non-violent offenders by advancing parole consideration dates).[8] Proposition 64 is another step consistent with this trend. Respondent's evocation of the days of yesteryear – lengthy prison sentences for possession of a trivial amount – are discordant with the electorate's current views regarding marijuana and incarceration.

[8] Meanwhile, the Legislature essentially repealed three-year drug-sales priors (Section 11370.2, as amended by S.B. 180, Stats 2017, ch. 677, section 1), repealed prison priors for most felonies (Penal Code section 667.5, as amended by S.B. 136, Stats 2019, ch. 590, section 1), and made 5-year priors discretionary (Penal Code section 1385(b), as amended by S.B. 1393, Stats 2018, ch. 1013, section 2).

B. Policy Disagreements Do Not Support An Interpretation Inconsistent With A Statute's Plain Meaning, Purpose, And Voter Intent

A court can, in rare circumstances, look to policy arguments to interpret an ambiguous statute. However, courts are not legislators and the circumstances under which a court does so are naturally circumscribed. For example, in *People v. Valencia* (2017) 3 Cal.5th 347 ["*Valencia*"], the court examined the definition of "unreasonable risk to public safety," which Proposition 47 added to the Penal Code in subdivision (c) of section 1170.18. Proposition 47 intended to "[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, *unless the defendant ha[d] prior convictions for specified violent or serious crimes*." (*Valencia*, at 363 (emphasis added).) However, the defendant in *Valencia* asserted that this definition extended to a different set of statutes, those previously enacted by Proposition 36. Although the language of proposition 47 ("as used throughout this code") appeared all-encompassing, the *Valencia* court held that the definition Proposition 47 enacted did not extend to the separate scheme of Proposition 36. This decision rested on facts not present here: the text at issue was part of an initiative regarding theft offenses and it would blindside voters to have it impact a separate set of laws regarding the resentencing of violent felons.

One justification for the finding of ambiguity in *Valencia* was that "the alleged effect on the Three Strikes Reform Act [was] not reflected in the

uncodified provisions of Proposition 47 that set forth the purposes of the measure." (*Id.*, at 360.) In fact, a broad interpretation was "difficult to reconcile with Proposition 47's uncodified preamble, which was presented to the electorate." (*Id.*, at 362 [referring to "the measure's 'Findings and Declarations' and its 'Purpose and Intent'"].) Proposition 47's "Findings and Declarations state[d] that the 'act ensures that sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed.'" (*Id.*, at 362.) "Proposition 47 reiterate[d] its Purpose and Intent as being to '[e]nsure that people convicted of murder, rape, and child molestation will not benefit from this act.'" (*Id.*, at 362-363.) The introductory provisions "further assured voters that the measure would reduce low-level felony convictions to misdemeanors, 'unless the defendant has prior convictions for specified violent or serious crimes.'" (*Id.*, at 363.) No wonder the *Valencia* court did not interpret the phrase "unreasonable risk to public safety" to benefit Three Strikes defendants.

The same conflict does not exist here. Proposition 64 did not "assure[] voters that the sentences of persons convicted of [possession of marijuana on jail or prison grounds] would not change." (*Valencia,* at 374.) To the contrary, the uncodified provisions of Proposition 64 clearly announced decriminalization of marijuana possession across the board. Indeed, decriminalization was central to Proposition 64's scheme, as reflected in its

"Findings and Declarations" and its "Purpose and Intent." (Prop. 64, Section 3 ["to establish a comprehensive system to legalize, control and regulate" marijuana]; Prop. 64, Section 2, subdivision G ["the courts are clogged with cases of nonviolent drug offenses']; Prop. 64, Section 3, subdivision (w) [to "[p]reserve scarce law enforcement resources"].) How can it be "inconsistent with and beyond the scope of any intention" to decriminalize marijuana on jail and prison grounds? (*Valencia,* at 362.)

Another reason the *Valencia* court found ambiguity was because the phrase at issue was in subdivision (c) of a section specifically related to the felonies that were being converted to misdemeanors. (*Id.*, at 363.) Allowing the definition to affect a different section, relating to an entirely separate category of felonies, would be a questionable and presumably unforeseen application. With Proposition 64, however, the proclamation that decriminalization would be "Subject to [exceptions], but notwithstanding any other provision of law" is immediately followed by the broad decriminalization of marijuana possession. (Section 11362.1.)

Cases like *Valencia* may be right to construe a phrase narrowly where a broader interpretation would reach into completely unexpected and unrelated territory and would be at odds with a proposition's stated

purposes.[9] But, as here, when the phrase is being applied to the very subject matter that the Proposition was addressing, in a manner consistent with the stated purposes, the words of the statute should control. Unlike *Valencia*, the conduct in issue here is well within the scope of a "comprehensive system to legalize, control and regulate" marijuana (Prop. 64, Section 3.) That Proposition 64 occupied the field is demonstrated by the breadth of its coverage and reach into all aspects of marijuana control: decriminalization, taxation, licensing, environmental protection, marketing practices, and more. It codified places marijuana could and could not be possessed. A plain reading, namely that the law decriminalized possession on jail or prison grounds, flows from the language itself and its position in the very section decriminalizing all possession. A plain reading is in accord with the Proposition's goals.

C. Creating an unstated exception to the statute to allow felony prosecution for possession of marijuana is unreasonable and unnecessary

Respondent argues that following the plain language of the Proposition "would ... cause serious unintended consequences." (Resp. Op.

[9] The *Valencia* court also discussed how application to Three Strike offenders would be procedurally difficult (given that Proposition 64 was enacted just two days before the deadline for Three Strikes defendants to apply for relief) and that Proposition 47 provided no procedures for these offenders. (*Valencia,* at 367-368.) No procedural problem is created by applying Proposition 64 to those convicted under Penal Code section 4573.6. The *Valencia* court also lamented the absence of any reference, whatsoever, to the Three Strikes laws. (*Valencia,* at 374 ["one would expect to see *some* mention of the Three Strikes law" (emphasis in original)].) Proposition 64 *did* explicitly mention jail or prison grounds.

Br., at p. 11.) The referenced outcomes are based upon speculation. (See *People v. Raybon, supra*, 36 Cal.App.5th, at 123 [questioning whether there is evidentiary support for Respondent's positions].) There is no evidence that prisons and jails have been inundated with prescription medications since *Fenton* was decided. "Do cigarettes, which are also contraband but not illegal in prisons, 'pour into prisons through the breach?'" (*Ibid.*) That is because decriminalization does not take control of facilities from corrections officials – the Director of Corrections still has the authority to prescribe and amend rules for the administration of prisons. (See *People v. Harris, supra*, 145 Cal.App.4th, at 1467 [rejecting an argument that "correctional officials would lose control over their facilities"].)

> The Director of Corrections has the authority to prescribe and amend rules for the administration of prisons. (§ 5058.) In addition, the counties have the authority to make reasonable rules and regulations for the administration of [the] county jails. (See § 4019, subd. (c).) The failure of section 4573 to proscribe smuggling prescribed controlled substances into a penal institution does not prevent penal institutions from imposing specific rules on whether controlled substances for which the inmate has a physician's prescription can be introduced into the institution. In other words, smuggling a prescribed controlled substance into a penal institution is not deemed desirable or permissible just because the Legislature, whether or not inadvertently, has not made it a felony.

(*People v. Fenton, supra*, 20 Cal.App.4th, at 970.)

Moreover, there are regulations already in place, which are sufficient to punish and deter this conduct. Respondent liberally uses the terms "legalize," "permitted," and "lawful" to connote images of consequence-free

marijuana possession, leading to an imagined parade of horribles. (See, e.g. Resp. Op. Br., at p. 31.) However, the initiative left intact the serious administrative punishments for such conduct. (15 C.C.R. sections 3176, 3315, 3323, and 3335; CDCR's Department Operating Manual section 52080.5, found at https://www.cdcr.ca.gov/regulations/adultoperations/dom-toc/, p.400; See also Section 11362.45(g) [authorizing further prohibitions by state or local agencies].) Decriminalization is not license and inmates remain subject to significant penalties for possessing marijuana.

Introduction of marijuana into a state penal institution remains a Division A-2 violation, subjecting an inmate to forfeiture of between 151-180 days credits (additional time he or she must serve); simple possession of marijuana is a Division B violation, requiring forfeiture of between 121-150 days credit. (15 C.C.R. section 3323, subdivisions (c)(6) and (d)(7).) An inmate may lose all visitation rights for one year and thereafter be permitted only non-contact visits for two additional years. (15 C.C.R. section 3315, subdivision (f).) In addition, possession of any controlled substance can lead to placement in administrative segregation housing. (15 C.C.R. section 3335.) Visitors who bring controlled substances into an institution may lose the right to visit any prisoner in the future. (15 C.C.R. section 3176, subdivision (c).) These are serious consequences for inmates. It is hyperbole

to suggest decriminalization "would open the door to smuggling and possessing [marijuana] in custodial institutions." (Resp. Op. Br., at p. 30.)

Without evidentiary support, Respondent asserts these administrative remedies are an insufficient deterrence. (Resp. Op. Br., at p. 44 ["Administrative penalties are hardly a substitute for the deterrence effected by the threat of felony convictions and long sentences"].) That may be the view of some policy makers, but it certainly has not been established by any evidence. To illustrate this theory, Respondent implies a "nothing to lose" scenario when inmates are getting close to their release dates. (Resp. Op. Br., at p. 45 ["As an inmate approaches the maximum period of confinement, the deterrent effect of administrative discipline necessarily decreases"].) But an inmate who is set to be released shortly will find that the loss of these credits extends his or her sentence significantly. A six-month loss of credits could actually be more significant to an inmate expecting release than one who has many years still to serve. In the end, "smuggling a prescribed controlled substance into a penal institution is not deemed desirable or permissible just because the Legislature, whether or not inadvertently, has not made it a felony." (*People v. Harris*, *supra*, 145 Cal.App.4th, at 1467, citing *People v. Fenton, supra,* 20 Cal.App.4th, at 970.) Proposition 64 just treats marijuana the same way medical marijuana has been treated since *Fenton.*

Respondent, to the Court of Appeal and to this Court, argues several other policy positions to persuade the Court not to follow Proposition 64's directives. Many are attempts to pass off failing policy arguments as voter intent. For example, Respondent proposes that there is "no apparent reason" why the voters would have decriminalized marijuana possession whilst intending to keep smoking or ingesting illegal. (Resp. Op. Br., at p15-16.) The answer is given by *Gutierrez*: "Obviously, the ultimate evil with which the Legislature was concerned was drug *use* by prisoners." (*People v. Gutierrez (in Re Gutierrez), supra,* 52 Cal.App.4th, at 386 (emphasis added).) The voters adopted a measure, which decriminalized simple possession because it is the consumption of marijuana that is the problem. The question is not, "For what purpose would an inmate possess cannabis that was not meant to be smoked or ingested by anyone?" (*People v. Perry*, *supra*, 32 Cal.App.5th, at 892). The apt question is, "Could rational voters want to avoid prison sentences for those who merely possess marijuana while retaining sanctions for those who actually use it?" And the answer, again given by *Gutierrez* and the voters of California, is "Yes."

Respondent argues additional "the sky is falling" outcomes. He argues the Court of Appeal's ruling will facilitate the introduction of marijuana into juvenile facilities by adults. (Resp. Op. Br., at p. 45.) But furnishing marijuana to a minor is a felony, carrying up to five years in

prison. (Section 11361.) Similarly, Respondent argues his interpretation is necessary to protect children, because otherwise it would be legal to possess marijuana in juvenile facilities. (Resp. Op. Br., at p. 42.) But those under age 21 do not benefit from the decriminalization of Section 11362.1. Respondent contends that the Court of Appeal's interpretation is inconsistent with the assurance that Proposition 64 would "continue to allow prosecutors to charge the most serious marijuana-related offenses as felonies." (Resp. Op. Br., at p. 42, quoting Prop. 64, section 2, subd.art G.) But, consistent with its protection of minors, prosecutors can still charge those who use a person under age 21 to sell marijuana (Section 11359(d)) or who possess marijuana for sale when they have qualifying priors (Section 11359(c)) with a felony.

There are sound reasons why the voters would want wholesale decriminalization to include possession on the grounds of a county jail or prison. Under Respondent's interpretation, teachers, janitors, guards, or other prison employees would be guilty of a felony for possessing marijuana at work, even though Proposition 64 proclaimed broadly it was legal. Under Respondent's interpretation, maintenance workers, attorneys, landscapers, and visitors who drive a vehicle containing marijuana onto the grounds of a jail or prison would be guilty of a straight felony, even if the marijuana was otherwise lawfully enclosed in a container in that vehicle. Respondent's

interpretation would allow felony charges for family members who made a no-contact visit to their loved one while having tiny amounts of marijuana in their pocket. Where there are courtrooms within or connected to jail facilities, observing a friend's court appearance while having a usable quantity of marijuana in one's purse could likewise bring felony charges.

Proposition 64 voters wanted to protect these and other people from criminal sanctions by decriminalizing simple possession across the board. A core stated purpose and intent of the legislation was to "alleviate pressure on the courts" because they "are clogged with cases of non-violent drug offenses." (Prop. 64, section 2, subdivision G.) That Proposition 64's decriminalization extends to possession on jail or prison grounds unless otherwise specifically excepted (such as when it is consumed) is entirely consistent with these purposes.

A court may disagree with Proposition 64's policies and may even feel them unwise. However, when statutory language is clear, courts "must follow the language used and give to it its plain meaning, whatever may be thought of the wisdom, expediency, or policy of the act, even if it appears probable that a different object was in the mind of the legislature." (*People v. Weidert*, *supra*, 39 Cal.3d, at 843 (citations omitted) [following the text of a statute which punished a more severe act less harshly, because that is what the statute said]; *Williams v. County of San Joaquin*, *supra*, 225 Cal.App.3d

1326, 1333 [reasoning that, if the statute's authors wanted a notice requirement, they would have written one in, and observing, "we in the judiciary have no authority to rewrite the law to fill this void"].) "The remedy for clearly written language that achieves a dubious policy outcome is not judicial intervention but correction by the people or the Legislature." (*People v. Raybon*, *supra*, 36 Cal.App.5th, at 125.) There is no need for this Court to act as legislator.

///

///

CONCLUSION

Proposition 64 advised voters that "individuals serving sentences for activities that are made legal or are subject to lesser penalties under the measure would be eligible for resentencing." (Voter Guide, at p. 95 [further indicating that persons released from prison "would be subject to community supervision (such as probation) for up to one year following their release."].) Section 11361.8 authorizes "resentencing or dismissal 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." Appellants ask this court to order the Superior Court to dismiss their charges in accordance with section 11362.1, which decriminalized their possession of marijuana.

DATED: 3/18/20

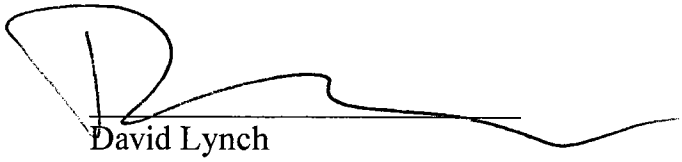
Respectfully submitted,

David Lynch
Assistant Public Defender

Leonard Tauman
Assistant Public Defender

BRIEF FORMAT CERTIFICATION PURSUANT TO CALIFORNIA RULES OF COURT 8.504

Pursuant to California Rules of Court 8.504(d), I certify that the foregoing brief is in 13-point, Times New Roman, proportionally-spaced typeface and contains 8,519 words, according to the word-count function of Microsoft Word, which was used to prepare the brief.



David Lynch
Assistant Public Defender
State Bar No. 186048

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DECLARATION OF MAIL SERVICE

I, DAVID LYNCH, being duly sworn, deposes and says:

I am and was on the dates herein mentioned over the age of 18 years and not a party to this action; my business address is 700 H Street, Suite 0270, Sacramento, California 95814.

I served a true copy of the **ANSWER BRIEF ON THE MERITS** in Case Number S256978 by depositing, in a pre-paid, addressed envelope into the United States mail on 3/18/20 to the persons/entities listed below:

RYAN B. McCONNELL
OFFICE OF THE SOLICITOR GENERAL
1300 I ST., SUITE 125, SACRAMENTO, CA 94244-2250

CALIFORNIA COURT OF APPEAL, THIRD APPELLATE DISTRICT
914 CAPITOL MALL, SACRAMENTO, CA 95814

CENTRAL CALIFORNIA APPELLATE PROGRAM
2150 RIVER PLAZA DRIVE, SUITE 300, SACRAMENTO, CA 95833

THE HONORABLE CURTIS FIORINI, DEPARTMENT 26
SUPERIOR COURT OF CALIFORNIA, 721 9TH ST., SACRAMENTO, CA 95814

ANNE MARIE SCHUBERT, OFFICE OF THE DISTRICT ATTORNEY
901 G ST., SACRAMENTO, CA 95814

I declare under penalty of perjury that the foregoing is true and correct.

Executed March 18, 2019, at Sacramento, California.